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No. _____

In The

Supreme Court of the United States

STATE OF CALIFORNIA, acting by and through the California State Water Resources Control Board,

Petitioner,

v.

UNITED STATES OF AMERICA, U.S. Department of Army, Corps of Engineers,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Ninth Circuit misapplied *Department of Energy v. Ohio* in reasoning that the Clean Water Act exempts a federal agency from a state's non-discriminatory regulatory fees, which are based on the volume of waste discharged and help pay for the state's cost of regulating the discharges?

2. Whether the Ninth Circuit erred in concluding that section 404(t) of the Clean Water Act, which provides that nothing in that section is a limit on a state's authority to regulate federal agencies, exempts federal agencies from section 313 of the Clean Water Act, which requires federal agencies to comply with state water quality requirements including reasonable service charges?

3. Whether the Ninth Circuit correctly reasoned that the United States was entitled to judgment as a matter of law that a state's regulatory fees based on the volume of discharge are illegal excise taxes rather than legitimate service charges, when both the First and Second Circuits, after appropriately reviewing factual records, have ruled that analogous fees are legitimate service charges within a congressional waiver of sovereign immunity?

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PETITION FOR WRIT OF CERTIORARI

The State of California respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Court of Appeals' order denying California's petition for rehearing and for rehearing en banc, the panel's Memorandum affirming the judgment of the district court, and the U.S. District Court's Opinion and Order, and Judgment are not officially reported.

JURISDICTION

The judgment of a panel of the United States Court of Appeals for the Ninth Circuit was entered on January 9, 2001. Appendix ("App.") at 1-2. The Court of Appeals denied California's petition for rehearing and for rehearing en banc on April 2, 2001. App. 31-32. The jurisdiction of this Court rests on 28 U.S.C. § 1251(b)(2).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Relevant portions of federal statutes and regulations, and California statutes and regulations, are set forth in the Appendix at pages thirty-three through seventy.

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

This is an action by the State of California seeking declaratory and injunctive relief to compel payment of delinquent Waste Discharge Requirements ("WDR" or "Waste Discharge Requirements") fees assessed against the U.S. Army Corps of Engineers' dredging operations in the State. The United States District Court (Judge William H. Orrick) had jurisdiction over the complaint under 28 U.S.C. § 1331 (federal question jurisdiction for all civil actions arising under Constitution, laws, or treaties of the United States), under 28 U.S.C. § 1346 (United States as defendant) and 28 U.S.C. § 1441 (removal by defendant). In addition, declaratory relief was appropriate under 28 U.S.C. § 2201, because an actual controversy had arisen and existed between state plaintiff and federal defendants.

B. The Nature of the Case, Course of Proceedings and Disposition Below

This case concerns the scope of the waiver of federal sovereign immunity in the federal facilities provisions of the Clean Water Act, sections 313(a), 33 U.S.C. § 1323(a), and section 404(t), 33 U.S.C. § 1344(t). In the State of California's view, these waiver provisions clearly and unequivocally require federal facilities discharging pollutants to California waters (including the U.S. Army Corps of Engineers in its dredge and fill activities) to comply with the provisions of state law which require the payment of permit-related Waste Discharge Requirements fees. In the United States' view, which was the view

adopted by the district court and the U.S. Court of Appeals for the Ninth Circuit, the provisions of the Clean Water Act do not waive federal sovereign immunity for imposition of such fees because, in their view, the permit fees are impermissible "punitive fines."

The State of California filed its original complaint in this case in federal district court on August 8, 1997. App. 130-140. Pursuant to a stipulation between the parties, California re-filed the case in California superior court on January 30, 1998, and the United States removed the case back to federal court. App. 127-129. On March 9, 1998, the United States moved to dismiss this case on the basis of sovereign immunity. In its Opinion and Order of January 19, 1999, the district court granted the United States' motion to dismiss. App. 5-29. The State of California appealed.

On January 9, 2001, a panel of the U.S. court of appeals issued a Memorandum affirming the district court's dismissal of California's action. In affirming, the panel adopted " . . . the judgment of the district court on the same basis as provided in the district court's well-reasoned opinion dated January 12, 1999." *See* Memorandum, filed January 9, 2001, App. 1-2. On April 2, 2001, the U.S. Court of Appeals for the Ninth Circuit denied California's petition for rehearing and for rehearing en banc. App. 31-32. The district court opinion, which now constitutes the Ninth Circuit's decision, concludes that section 404(t) of the Clean Water Act does not authorize recovery of the fees[1] because they are "punitive fines," that section

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[1] The decision also addresses fees pursuant to California's Bay Protection and Toxic Cleanup Program. These fees are no

313 of the Clean Water Act is not applicable because the waiver of sovereign immunity in section 404(t) is narrower and more specific, and that even if section 313 did apply it would not authorize recovery of the fees because they are an impermissible tax on the federal government.[2]

C. Statement Of Facts

Key factual allegations are contained in the State's "Complaint for Declaratory Relief, Injunctive Relief, and to Compel Payment of Delinquent Fees." App. 130-140. For the purpose of the United States' motion to dismiss, it did not dispute these facts.

The California State Water Resources Control Board, together with the nine California Regional Water Quality Control Boards, assess fees on dischargers to the waters of the state pursuant to the Porter-Cologne Water Quality Control Act. The U.S. Army Corps of Engineers' dredging and/or fill operations in the State of California are subject to the requirements of these provisions of state law, including the requirement to pay reasonable fees associated with these permits and programs. *See* Complaint ¶¶ 10, 12, and 14, App. 135, 137-138. The United States has failed or refused to pay fees assessed by the state

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longer an issue. Due to a change in California law unrelated to the sovereign immunity issue, California no longer seeks collection of these fees. App. 72-73.

[2] Citations to the district court's Opinion and Order, which is found in the Appendix at pages one through thirty, are cited in this petition as "Ninth Circuit decision" or "the decision."

agencies. Complaint ¶ 14, App. 138. The delinquent WDR fees amount to at least $275,000 for dredging projects located throughout California. *See* Complaint ¶¶ 4, 10, 14, App. 131-132, 135-136.

D. California's Waste Discharge Requirements, Reports, and Permit-Related Fees

California Water Code sections 13000-13953.4 is known as the "Porter-Cologne Water Quality Control Act." Cal. Water Code § 13020. Water Code section 13260 requires that any person discharging waste, or proposing to discharge waste, that could affect the quality of the waters of the state, other than into a community sewer system, shall file with the appropriate California regional water quality control board a report of the discharge. "Person" is defined to include the United States, to the extent authorized by federal law. Cal. Water Code § 13050(c).

Section 13260 further provides that each person for whom Waste Discharge Requirements have been provided pursuant to section 13263 shall submit both an application fee and subsequent annual fee not to exceed $10,000 per year according to a reasonable fee schedule established by the State Water Board ("WDR fees"). Cal. Water Code § 13260(d)(1). The application fee serves as the first annual WDR fee.[3] By state statute, WDR fees are

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[3] The Ninth Circuit erroneously believed that application and reporting fees are "separate and distinct" from the WDR fees in question. Decision, App. 13. This may account for the court's determination (completely unsupported in the record)

to be calculated based on total flow (of waste discharged), *volume* (of waste discharged), number of animals or area involved – all factors indicative of the potential water quality impacts of the discharge and the extent of regulatory oversight required. Cal. Water Code § 13260(a)(1), (d)(1), and *see* fee schedule for dredge and fill operations at Cal. Code Regs., tit. 23, § 2200(e). Notably, punishment or redress for a discharger's past violations is not one of the factors considered in calculating WDR fees. *Id.*

Pursuant to section 13260(d)(2), all WDR fees collected are deposited in the Waste Discharge Permit Fund which is limited to expenditure by the State Water Board, upon appropriation by the Legislature, for the purposes of carrying out the Porter-Cologne Water Quality Control Act. Therefore, revenues from WDR fees may be used for, *inter alia*, processing applications for WDRs, water quality investigations and inspection of facilities to ascertain compliance, and responding to incidences of spills or improper discharges from facilities. *See* Cal. Water Code §§ 13263, 13267, and 13304.

REASONS FOR GRANTING THIS PETITION

The decision of the U.S. Court of Appeals for the Ninth Circuit warrants review by this Court, because the Ninth Circuit has decided important, recurring questions of federal compliance with state environmental law and

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that the WDR fees' "primary function is to penalize, or at least render very costly, lawful dredging activities." *Id. See* Cal. Water Code § 13260(e).

in so doing, has conflicted with decisions of this Court, and with decisions of the First and Second Circuits. The decision misconstrues the Clean Water Act in holding that sections 313(a) and 404(t) do not waive federal sovereign immunity from the state permit-related regulatory fees at issue here. The waiver contained in those sections is clear, unambiguous, and unequivocal and federal dischargers, like other dischargers, are subject to California's "requirements," including "reasonable service charges."

Moreover, in ruling that California's Waste Discharge Requirements fees are excise taxes rather than service charges, the court erroneously defined the word "service" in the "reasonable service charges" waiver in an untenable fashion that conflicts with the decisions of the Second and First Circuits.

Third, in granting the United States' motion to dismiss this action, the Ninth Circuit denied California the opportunity to develop a factual record which would have demonstrated the services and benefits available to the United States from its payment of regulatory fees.

Lastly, the Ninth Circuit fundamentally misunderstood the essential nature of the classic regulatory fees at issue here and treated them as if they were disguised civil penalties, even though California has never sought civil penalties in this case. California seeks only reasonable service charges which all dischargers must pay. The amount of the fees is based on the volume of discharge and has nothing to do with punishment for past noncompliance. Thus, the Ninth Circuit decision conflicts with this Court's decision in *Department of Energy v. Ohio*, 503

U.S. 607 (1992), which permits monetary assessments against the federal government which do not punish dischargers for their past noncompliance.

Thus, the Ninth Circuit's decision is inconsistent and fraught with error – it ignores congressional words of waiver, misconstrues or ignores cogent precedent from other Circuits, and upsets the well-established distinction between punitive penalties and classic regulatory fees. The decision, if allowed to stand, would seriously undermine the fair and orderly implementation of California's water pollution regulation by exempting federal dischargers from paying the same reasonable service charges that are assessed to private dischargers. Moreover, although the decision is unpublished, it represents the latest chapter in the recurring controversy between the states and the United States regarding the compliance of federal polluters with state environmental requirements. Thus, the decision has very significant implications for federalism and requires the review of this Court.

ARGUMENT

I. In Determining That California's Waste Discharge Requirements Fees are Disguised Penalties Although They Do Not Punish Dischargers for Past Misconduct, the Ninth Circuit Has Decided an Important Federal Question in a Way That Conflicts With This Court's Decision in *Department of Energy v. Ohio*.

California seeks only payment of delinquent service charges. It has not, and does not, seek any civil penalties

or fines.[4] But the Ninth Circuit erroneously treated California's WDR fees as if they were punitive civil penalties, a fundamental error which skewed the court's analysis and led to the improper dismissal of this lawsuit. And although the decision purports to rely on *Department of Energy v. Ohio*, 503 U.S. 607 (1992), it misconstrues and misapplies that case.

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[4] California has never sought civil penalties or criminal fines in this case. The State simply seeks payment of reasonable service charges which all dischargers, including the U.S. Army Corps of Engineers, must pay. *See* Complaint ¶¶ 13-16 and Prayer for Relief, and discussion at August 6, 1998 and August 27, 1998, district court hearings. App. 139, 120-121, and 102.

California law authorizes assessment of civil penalties (known as "civil liability") for the nonpayment of water quality fees. *See, e.g.*, Cal. Water Code §§ 13261, 13323, 13328, 13350, 13385. *Here, however, California has not assessed, and does not seek, any penalties or fines from the United States for the delinquent fees owed by the Corps of Engineers.* Section 313(a) of the Clean Water Act provides, in pertinent part, that "the United States shall be liable only for those civil penalties arising under federal law or imposed by a State or local court to enforce an order for the process of such court." 33 U.S.C. § 1323(a). If civil penalties were to be imposed here they would be imposed for the United States' past violations of law, i.e., its nonpayment of fees. But such "backward-looking" civil penalties are not authorized by the Clean Water Act, 33 U.S.C. § 1323(a). *See Department of Energy v. Ohio*, 503 U.S. at 620-627; *compare, United States v. Tennessee Air Pollution Control Board*, 185 F.3d 529 (6th Cir. 1999) (punitive penalties against federal facilities are authorized by the Clean Air Act). Thus, the plain language of section 313(a) of the Clean Water Act bars the imposition of civil penalties on federal dischargers to punish or redress their past violations, just as the plain language of other provisions of section 313(a) as well as section 404(t) of the Clean Water Act clearly and unambiguously waive sovereign immunity for the regulatory fees at issue here.

In *Department of Energy v. Ohio*, this Court interpreted the Clean Water Act and the Resources Conservation and Recovery Act. It disallowed Ohio's attempt to assess "punitive" state civil penalties upon federal facilities in the state, i.e., penalties that punished past noncompliance by the United States. At the same time, this Court permitted "coercive" state civil penalties, i.e., penalties which attempted to compel future compliance of federal facilities with state law. 503 U.S. at 623-628.

Nothing in the California Water Code or in the regulations establishing WDR fees indicates that these fees are, or are intended to be, either punitive fines to punish past noncompliance or coercive penalties to compel future compliance. Yet the Ninth Circuit decision concludes, without any opportunity for the State to submit evidence on the issue, that these fees are punitive. The Ninth Circuit concluded:

> The fees at issue here are not directly related to compliance mechanisms to implement substantive state dredging or discharge requirements. Instead, the assessments are collected from individuals or governments engaged in dredging activities *regardless* of their future or past record of compliance with substantive state effluent standards. In that sense, they more closely resemble the impermissible punitive fees discussed in *DOE*. Decision, App. 12.

Thus, the decision characterizes California's WDR fees as "punitive," purportedly pursuant to *Department of Energy v. Ohio*. But *Ohio* involved a state's efforts to impose civil penalties for previous violations. The Court did not rule that payments required by a state would be

punitive if they were imposed on all facilities *regardless* of their record of compliance with state standards. Quite the opposite: *Ohio* held that civil penalties were punitive (and thus outside the scope of the Clean Water Act's waiver of sovereign immunity) when they were imposed *because of* a record of noncompliance with state standards. *Id.* at 623-628.

Here, California indeed assesses WDR fees on individuals or governments engaged in dredging activities based on the *volume* of dredged or fill material, without regard for their record of compliance with state standards. Cal. Water Code § 13260(a)(1), (d)(1); Cal. Code Regs., tit. 23, § 2200(d). These WDR fees do not "resemble the impermissible punitive fees" discussed in *Ohio* at all. Decision, App. 12. Thus, to the extent *Ohio* is relevant to this fee dispute, its lesson is that California's WDR fees are not punitive because they do not punish dischargers for past misconduct.

II. In Ruling That the Clean Water Act Does Not Waive Sovereign Immunity for Payment of California's WDR Fees by the Army Corps of Engineers, the Ninth Circuit Has Erroneously Decided an Important Question of Federal Law That Has Not Been, but Should be, Settled by This Court

This Court has repeatedly recognized the critical importance of cooperative federalism between the states and the United States in environmental regulation. *See, e.g., PUD No. 1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700, 723 (1994) (states may include minimum stream flow requirements in certifications issued pursuant to section 401 of the Clean Water

Act); *New York v. United States*, 505 U.S. 144, 167-168 (1992) (affirming federal monetary and access incentives to states, but disallowing federal mandate resulting in state liability for low-level radioactive waste); and *California v. United States*, 438 U.S. 645, 679 (1978) (states may impose conditions on water appropriation permits they grant to the United States). Indeed, as this Court has stated, the Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). This case is an integral part of the continuing definition of that partnership, and it requires the guidance of this Court.

In *Department of Energy v. Ohio*, this Court construed sovereign immunity provisions of RCRA and the Clean Water Act in a narrow but lucid fashion, concluding that coercive civil penalties, but not punitive penalties, were within the scope of the waiver provisions. The Ninth Circuit's analysis here, by contrast, produced an incoherent and confusing decision which, *inter alia*, equates classic regulatory fees with punitive fines, and ignores some words of waiver in the Clean Water Act while misconstruing others. In affirming the district court's dismissal in the absence of a factual record, the Ninth Circuit effectively ruled that a state cannot apply its water quality regulatory fees to federal agencies, without regard to the reasonableness of those fees as applied to the activity being regulated. This Court should accept this important case for review and look to all the pertinent provisions of the Clean Water Act and the California Water Code (and its regulations) which define the legitimate scope of the Waste Discharge Requirements fees at issue here, in order

to determine that Congress has expressed its unequivocal waiver of sovereign immunity for these fees, the same fees which apply to any other discharger.

A. Section 404(t) of the Clean Water Act

Congress clearly and unambiguously waived federal sovereign immunity in the Clean Water Act in sections 313(a) and in 404(t). 33 U.S.C. §§ 1323(a), 1344(t). Section 313(a)'s waiver is applicable generally to all federal facilities, while section 404(t)'s waiver specifically addresses dredge/fill activities. Section 404(t) provides:

> **(t) Navigable waters within State jurisdiction**
>
> *Nothing in this section shall preclude or deny the right of any State . . . agency to control the discharge of dredged or fill material* in any portion of navigable waters within the jurisdiction of such State, *including any activity of any Federal agency,* and each such agency *must comply with such State . . . requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements.* 33 U.S.C. § 1344(t) (Emphasis added).

The only words limiting "requirements" are "substantive and procedural." Accordingly, the "requirements" waiver in 404(t) includes the assessment of state permit-related water quality fees.

In its 1977 amendments to the Clean Water Act, Congress added section 404(t) as an explicit response to *Minnesota v. Hoffman,* 543 F.2d 1198 (8th Cir. 1976), *cert. denied,* 430 U.S. 977 (1977). The *Minnesota* court held that the

Corps was not required to obtain a state permit or meet state water pollution control standards in its dredging operations. Reacting to the ruling, as well as to this Court's rulings in *Hancock v. Train*, 426 U.S. 167 (1976), and *EPA v. California*, 426 U.S. 200 (1976), Congress[5] emphatically reiterated its clear and unambiguous textual waiver of sovereign immunity:

> The [Clean Water A]ct has been amended to indicate unequivocally that all federal facilities and activities are subject to all of the provisions of State and local pollution laws.
>
> * * *
>
> The amendment to section 404 clarifies the intent of Congress relative to *the dredging activities of the U.S. Army Corps of Engineers. . . . The corps, like other Federal agencies, should be bound by the same requirements as any other discharger into public waters.*
>
> * * *
>
> *Pursuant to this amendment, the corps may be required by the States in some instances to expend additional funds to protect water quality. The committee supports funds for this purpose.*

S. Rep. No. 95-370, at 67-8 (1977) (Emphasis added). As these passages indicate, in enacting section 404(t), Congress clearly intended an unequivocal waiver of federal

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[5] Note that we cite the legislative history of the Clean Water Act not to imply any waiver but simply to bolster the plain meaning of the statute, which itself clearly and unambiguously waives sovereign immunity for the fees at issue. *See, e.g., Sierra Club v. Lujan*, 831 F.2d 1421 1428 (10th Cir. 1990).

sovereign immunity which encompasses the payment of fees at issue here.

B. Section 313(a) of the Clean Water Act

Clean Water Act section 313, entitled "Federal Facilities Pollution Control," subjects the discharges of "each" federal agency to state control. 33 U.S.C § 1323. Notably, Congress uses the word "requirements" in the same context in both the 404(t) and 313(a) waivers.

Section 313(a) reads in pertinent part:

> Each department, *agency*, or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . (2) *engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall* be subject to, and *comply with, all* Federal, *State*, interstate, and local *requirements*, administrative authority, and process and sanctions *respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges*. The preceding sentence shall apply (A) to *any requirement whether substantive or procedural* (including any recordkeeping or reporting requirement, *any requirement respecting permits and any other requirement, whatsoever*) . . . 33 U.S.C § 1323(a) (Emphasis added).

The text uses the "any" and "all" language. In addition, the 313(a) waiver of sovereign immunity gives "the payment of reasonable service charges" as one example

of "requirements . . . respecting the control and abatement of water pollution . . . " Notably, such "requirements" include *"any requirement respecting permits and any other requirement, whatsoever."* (Emphasis added.) Moreover, section 313(a) mandates its application "notwithstanding any immunity of such agencies . . . under any law or rule of law."[6]

Therefore, if the Corps is "engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants," as it clearly is here,[7] section 313(a)'s waiver of sovereign immunity applies, even though section 404(t) also applies whenever the Corps' pollutant-discharging activities involve the discharge of dredged spoils.[8] This does not render section 404(t) superfluous,

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[6] In its analysis of the section 313(a) waiver, the Ninth Circuit decision does not quote, or even mention, these last two critical phrases. Decision, App. 14-17.

[7] The definition of "pollutant" in the Clean Water Act includes "dredged spoils." 33 U.S.C. § 1362(6); *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162, 1166 (9th Cir. 1998).

[8] Congress intended to overrule *Minnesota*, a case holding that a state could not regulate Corps' activities, even where the express terms of Section 313 as construed in *EPA v. California* would allow state regulation. This holding was based in part on the reasoning that because Corps' activities are specifically addressed in section 404, the absence of a waiver of sovereign immunity in section 404 prevails over the express waiver in section 313. 543 F.2d at 1202-08. Thus, enactment of section 404(t) helps clarify that Congress did not intend section 404 from being interpreted as a specific section that, by its silence on the sovereign immunity issue, creates an implied exception from section 313. Without section 404(t), the reasoning of *Minnesota* could still be applied to circumvent Congress' intent

because section 404(t) serves to clarify that section 313 applies to Corps' activities.[9]

C. Sections 313 and 404 Are Complementary

In its decision the Ninth Circuit suggests that the "requirements" language in section 313 may be *broader* than the "requirements" language in section 404.[10] App. 15-16. But there is no indication that "requirements" has a different meaning in section 404 than it does in section 313.[11] Far from being in conflict, both provisions of the Clean Water Act address the discharge of materials into state waters resulting from federal activities. And, the

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that the Corps, like other federal agencies, should be bound to the same requirements as any other discharger.

[9] In addition, some discharges that are not located on federal facilities and do not include discharge of dredged spoils may be covered by section 404(t) but not section 313 because they do not involve a discharge or runoff of "pollutants." *See Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162, 1166 (9th Cir. 1998); 33 CFR 323.2(d)(1).

[10] Unlike the Ninth Circuit, we do not read section 313(a) as only "tangentially" connected to dredge assessments. Decision, App. 16. Indeed, section 313(a) speaks directly to California's statutory right to control and abate water pollution by imposing "requirements" on any activity causing "discharge or runoff of pollutants," including the Corps' discharges of dredged spoil.

[11] It is a maxim of statutory interpretation that "when the same words are used in different sections of the law, they will be given the same meaning." *Barnson v. United States*, 816 F.2d 549, 554 (10th Cir. 1987), *cert. denied*, 484 U.S. 896 (1987); *see also, Firestone v. Howerton*, 671 F.2d 317, 320 n.6 (9th Cir. 1982).

"requirements" for the Corps are the same as for all other federal agencies.[12]

The Ninth Circuit construed the Clean Water Act so that section 404(t) effectively overrides the provisions of section 313(a). But this interpretation turns the statute on its head. The express language of section 404(t) is that: "Nothing in this section shall preclude or deny the right of any State . . . to control the discharge and dredge or fill material . . . including any activity of any federal agency." The manifest intent of Congress is to prevent section 404 from trumping State authority, as authorized or preserved, under sections 313, 510 or other provisions of the Clean Water Act. Indeed, the choice of the language "Nothing in this section shall preclude any State . . . " presupposes that the State has authority under other law, as indeed it does under section 313, which starts with "Each . . . agency shall." When sections 313 and 404(t) are viewed together, section 313 properly emerges as the primary waiver, while section 404(t) is fundamentally a savings clause. The two sections are complementary, and do not conflict.

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[12] Case law affirms the complementary nature of sections 313 and 404. In *Friends of the Earth v. United States Navy*, 841 F.2d 927 (9th Cir. 1988), the court stated that "[t]wo sections of the . . . Clean Water Act . . . require the Navy to comply with all state and local requirements concerning the discharge of dredged or fill materials and the control of water pollution. 33 U.S.C. §§ 1344(t), 1323 (1986)." *Id.* at 929. *Friends of the Earth* illustrates how sections 313(a) and 404(t) both waive sovereign immunity with regard to "requirements." The "payment of reasonable service charges" is one example of the "requirements" waived by both provisions.

Thus, the Ninth Circuit decision fails to take into account the complementary relationship between the primary waiver and the savings clause, and as a result frustrates Congress' intent to waive sovereign immunity. By its ruling that the term "requirements" has a narrower meaning in section 404(t) than in section 313, and its mechanistic application of a rule of construction that the specific prevails over the general, despite the plain language, the structure, and the history of the Clean Water Act, the Ninth Circuit has erroneously decided an important question of federal law that should be settled by this Court.

III.

In Erroneously Ruling That the United States Was Entitled to a Judgment as a Matter of Law That California's Waste Discharge Requirements Fees Are Excise Taxes Rather Than Service Charges, the Ninth Circuit Has Entered a Decision in Conflict with the Decisions of the Second and First Circuits on the Same Important Matter

A. Overview

The Ninth Circuit erroneously ruled that the United States was entitled to judgment as a matter of law that California's WDR fees are excise taxes rather than service charges under section 313(a) of the Clean Water Act. In so doing, the Ninth Circuit decision conflicts with the decisions of the Second and First Circuits which provide cogent precedent for construction of the phrase "reasonable service charges" in sovereign immunity cases involving payment of fees. Thus, this Court should resolve the conflict between the Ninth Circuit, and the Second and

First Circuits, on this important question of federalism: federal compliance with state environmental law.

Specifically, the congressional waiver language contained in the Resources Conservation and Recovery Act ("RCRA") (federal government is subject to state solid waste and hazardous waste requirements, including the payment of "reasonable service charges") is strikingly similar to the waiver language contained in the Clean Water Act (federal government is subject to state water pollution abatement and control requirements including the payment of "reasonable service charges"). *See* 42 U.S.C. § 6961(a), 33 U.S.C. § 1323(a). And significantly, the "reasonable service charges" waiver language in RCRA has been construed by the First Circuit, and by the Second Circuit, as including the same type of regulatory fees that are at issue in this case. *See Jorling v. United States Department of Energy*, 218 F.3d 96 (2d Cir. 2000) and *State of Maine v. Department of Navy*, 973 F.2d 1007 (1st Cir. 1992).

B. *Jorling v. United States Department of Energy*; and *State of Maine v. Department of Navy*

On May 31, 2000, the Second Circuit in *Jorling v. United States Department of Energy* ruled that certain hazardous wastes regulatory charges imposed by New York are "reasonable service charges" within the meaning of the provision of RCRA that waives the sovereign immunity of the United States. *See* 42 U.S.C. § 6961(a). In affirming the federal district court's grant of summary judgment to New York, the Second Circuit relied extensively on facts in the record developed in the district court, including affidavits submitted by New York, which

demonstrated, *inter alia*, that New York's waste regulatory charges are calculated on a basis that reasonably reflects the size and scope of an entity's operations, e.g., the number of tons of hazardous waste generated, or received, annually by a facility, or the number of vehicles permitted to be used to transport such waste. 218 F.3d at 97, 103-105.

As in the instant case, the issue in *Jorling* was whether certain State regulatory charges were "reasonable service charges" pursuant to a Congressional waiver of federal sovereign immunity. RCRA provides that each department, agency, and instrumentality of the federal government

> engaged in any activity resulting or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of *reasonable service charges*. 42 U.S.C. § 6961(a) (emphasis added).

According to the *Jorling* court, Congress "clarified"[13] the scope of the waiver of sovereign immunity in this provision by adding the following language in 1992:

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[13] *Jorling* cannot be distinguished from the instant case based on the illustrative examples of reasonable service charges added to RCRA by the Federal Facility Compliance Act of 1992 ("FFCA"). First, *Jorling*, in citing the FFCA language, noted that Congress was *clarifying* the scope of the sovereign immunity waiver contained in 42 U.S.C. § 6961(a). *Jorling*, 218 F.3d at 105. Second, nowhere in the opinion does *Jorling* rely on the FFCA

> The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any . . . reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program. Federal Facility Compliance Act of 1992, Pub.L.No. 102-386, § 102(a)(3), 106 Stat. 1505, 1505 codified at 42 U.S.C. § 6961(a). See H.R. Rep. No. 102-111, at 6 (1991) ("In providing for the payment by federal facilities of 'reasonable service charges,' the Committee reaffirms and clarifies existing language which requires that federal agencies pay those fees and charges which other persons are subject to under federal, state, interstate and local solid or hazardous waste regulatory programs.") reprinted in 1992 U.S.C.C.A.N. 1287, 1292.

In determining the reasonableness of New York's regulatory charges, the *Jorling* court applied the three-part test articulated by this Court in *Massachusetts v. United States*, 435 U.S. 44 (1978). In that case, the Supreme

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language for its holding that New York's fees are "reasonable service charges" within the meaning of RCRA.

Court upheld federal assessments on a state police helicopter pursuant to a registration tax on all civil aircraft flying in federal air space. *See id.* at 452.

In the *Jorling* appeal, the United States did not dispute the first or third parts of the *Massachusetts* test, recognizing that New York's waste regulatory charges are non-discriminatory and are not structured to produce revenues that will exceed the total cost to New York of the benefits to be supplied. 218 F.3d at 101. However, the United States did dispute the second part of the *Massachusetts* test, challenging the federal district court's finding that no reasonable jury could find that the waste regulatory charges did not meet the "fair approximation" component of the *Massachusetts* test. *Ibid.* The United States argued that the charges could not meet the "fair approximation" component, because by its calculations, the charges in a six-year period exceeded the cost of supplying the services actually received by a nine-to-one ratio. *Ibid.*

The *Jorling* court rejected the United States' contention that the "fair approximation" component of the *Massachusetts* test required a detailed cost accounting analysis that endeavors to determine the costs properly allocated to each payer, of every person, product and facility involved in providing the service. *Id.* at 103. The *Jorling* court made it clear that *Massachusetts* held only that the method used to calculate New York's fee must rationally be designed to approximate prospectively the benefit to the user of not only services specifically used by a payer, but also services *available* for use by a payer. *Ibid.*

Notably, in applying the *Massachusetts* test, the Second Circuit relied extensively on evidence in the record including affidavits submitted by New York demonstrating the regulatory services available to the United States as a generator of hazardous wastes, including "capacity assurance services," "waste reduction services," and "storing, reporting, labeling and shipping services." *Id.* at 104. For each kind of service, New York's affidavits explained, the state services provided increased in proportion to the amount of waste generated, e.g., because of inspection requirements. *Ibid.*

Accordingly, the Second Circuit held that the district court, based on the state's affidavit evidence, properly ruled that the waste regulatory charges met the "fair approximation" component of the *Massachusetts* test:

> By assessing a higher charge based on the amount of hazardous waste generated or received, as well as imposing additional charges for each incinerator, landfill, and surface impoundment, the method of calculating the hazardous waste program charges is reasonably designed to fairly approximate use of the hazardous waste system's *available services*, and thereby to approximate the cost of supplying such *services* to particular generators of waste or operators of waste facilities. By charging for each vehicle permitted to be used to transport waste, the method of calculating waste transporter program charges is reasonably designed to fairly approximate use of [New York Department of Environmental Conservation's] *services* and thereby to roughly approximate the cost of supplying these *services* to transporters of waste. *Id.* at 105. (emphasis added.)

Although not addressing the precise issue of whether the regulatory benefits that New York provides regulated federal facilities constitute "services" under RCRA, the *Jorling* court treated such benefits as services within the meaning of RCRA. And although in *Jorling*, unlike the instant case, the United States stipulated that the fees in question were "services" and only challenged the reasonableness of those service charges, that fact does not lessen the import of *Jorling* to this case. Plainly, with its detailed discussion of the extent, nature, and type of services that New York provides to regulated federal facilities, the Second Circuit's view is that such benefits are well within the meaning of "reasonable service charges" in RCRA.

And, of course, the Second Circuit did not construe the phrase "reasonable service charges" in a factual vacuum as the Ninth Circuit did here. Instead, it referred repeatedly to the extensive record developed detailing the nature, extent, and type of services provided by New York to the regulated federal facilities.

Likewise, in the case of *State of Maine v. Department of Navy*, 973 F.2d 1007 (1st Cir. 1992), the First Circuit interpreted the phrase "reasonable service charges" appearing in RCRA, upholding the district court's denial of the United States summary judgment motion, in an opinion written by then Chief Judge Steven Breyer. *Id.* at 1011. See extensive discussion of *State of Maine* in Brief for Appellant State of California, App. 79-87. Like the *Jorling* court, the *State of Maine* court emphasized the significance of the availability of services to regulated entities, including the federal government, not whether any particular federal facility had received specific services in the past

funded by a particular fee. *Id.* at 1014. In *State of Maine*, discovery documents suggested that there was a rough relationship between state regulatory fees charged and state regulatory costs related to a Navy shipyard located in Maine that was sufficient to show that the state regulatory charge was reasonable and permissible. The fees were not an impermissible "tax" on a federal installation. *Id.* at 1013, quoting *Massachusetts v. United States*, 435 U.S. at 468-69 (1978). As in *Jorling*, the *State of Maine* court emphasized that the law does not require a precise correlation between regulatory fees collected and regulatory services provided to each regulated entity. *Id.* at 1014.

And although the United States did not argue in *State of Maine* that the challenged fees were not "service charges," but instead challenged their reasonableness, that fact does not diminish the important guidance that *State of Maine* provides in this case. For example, the First Circuit discusses extensively the nature, type and extent of regulatory services provided by Maine to regulated federal facilities. *Id.* at 1011-1014. Indeed, in holding that, in RCRA, Congress waived the sovereign immunity of the United States from reasonable fees but not from unreasonably high fees, the court states:

> A regulatory, or licensing fee, insofar as it is reasonable, seems properly viewed as a kind of charge for a regulatory, or administrative, "service." *Id.* at 1012.

Certainly the *State of Maine* court viewed the regulatory benefits that Maine provided to the United States as "services" within the meaning of RCRA.

As in the *Jorling* and *State of Maine* cases, California's WDR fees are calculated on a basis that reasonably

reflects the size and scope of the federal facilities' operations. Essentially, California's WDR fees with respect to dredging and filling are calculated based on the *total volume* of dredge and fill material discharged, a factor that logically indicates the potential water quality impacts[14] of the discharge and the extent of regulatory oversight required. Cal. Water Code § 13260(a)(1),(d)(1). The *State of Maine* and *Jorling* cases recognize that a state's cost of reviewing permit applications, conducting investigations and inspections, reviewing reports, taking enforcement actions, and other regulatory activities overseeing the dredging activities constitute regulatory services for which fees may be charged. Here, if it had been afforded the opportunity, California could have submitted evidence of the services it provides to the Corps of Engineers. For example, at trial or upon summary judgment with affidavits, California could have shown that the WDR fees were expended for such activities as administrative and environmental review, discharge monitoring, record keeping, and investigation of the

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[14] The Ninth Circuit misconstrued the function of the WDR fees in citing the United States' contention that the WDR fees "are placed in a general fund and are not linked to water quality service or related to permitting requirements or other related activity." Decision, App. 23. Here, the WDR fees collected and deposited in the waste discharge permit fund are clearly linked to state water quality services and permitting requirements. *See* Cal. Water Code § 13260(d)(2) and see discussion above at pp. 5-7. And, in any case, " . . . as long as charges fairly approximate use and thereby fairly approximate costs of available services, it does not matter whether or how a governmental entity segregates the money it collects." *Jorling*, 218 F.3d at 105.

water quality impact of Corps of Engineers dredging.[15] Such services are quite comparable to the services approved in the *Jorling* and *State of Maine* cases.

But California never got the chance to demonstrate the services that it makes available to the Corps of Engineers as a regulated discharger because the Ninth Circuit, in the absence of a factual record, found that California provides *no services or benefits* to the Corps. Decision, App. 25. This directly contradicts *Jorling* and *State of Maine,* which recognize that the cost of reviewing permit applications, conducting investigations and inspections, reviewing reports, taking enforcement actions, and other regulatory activities constitute legitimate regulatory services for which reasonable fees may be charged. Thus, the Ninth Circuit erroneously rejected persuasive case law which defines service charges and distinguishes regulatory fees from taxes, and instead adopted an excessively narrow and rigid definition not supported by relevant case law.

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[15] The California Water Code is replete with provisions and requirements that make regulatory services available to the Corps. Those services include water quality investigation, establishing or reviewing waste discharge requirements, monitoring, and inspection. *See* discussion above at pp. 5-6. But the Ninth Circuit's decision ignores these available regulatory services.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, Acting by and through the California State Water Resources Control Board, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF ENGINEERS, Defendants-Appellees.	No. 99-15279 D.C. No. CV-98-00792-WHO MEMORANDUM[1] (Filed Jan. 09, 2001)

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding

Argued and Submitted April 10, 2000
San Francisco, California

Before: GOODWIN, BRUNETTI and THOMAS, Circuit Judges.

Having thoroughly reviewed the briefs, the record and the oral arguments presented by the parties, we affirm the judgment of the district court on the same basis

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

as provided in the district court's well-reasoned opinion dated January 12, 1999.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 99-15279
CT/AG#: CV-98-00792-WHO

STATE OF CALIFORNIA, Acting by and through the California State Water Resources Control Board

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF ENGINEERS

Defendants-Appellees

STATE OF NEW YORK, amicus

Amicus

JUDGMENT

(Filed Apr. 16, 2001)

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this cause be, and hereby is affirmed.

Filed and entered: January 9, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, Acting by and through the California State Water Resources Control Board, Plaintiff, vs. UNITED STATES OF AMERICA, et al., Defendants.	No. C-98-0792 WHO OPINION AND ORDER (Filed Jan. 12, 1999)

The State of California, Acting by and through the California State Water Resources Control Board ("State Board" or jointly "California"), brought suit against the United States of America and the United States Department of Army Corps of Engineers ("corps" or jointly "United States") to recover fees based on the multiple dredging operations that the United States carried on in California. The United States moved to dismiss the action on the ground that these fees are prohibited by the Supremacy Clause of the United States Constitution. Because the United States has not waived sovereign immunity for the dredging assessments that California seeks, its motion to dismiss is granted.

I.

The Corps is an agency of the United States government that performs dredging projects in California and

across the United States. *See* Water Resources Development Act of 1996, Pub. L. No. 104-303, 110 Stat. 3658 (1996). The purpose of these projects is to improve navigation in waterways and "to provide for the conservation and development of water and related resources. . . . " *Id.* at 3658. Congress has authorized the Corps to spend millions of dollars in California on the dredging of Humboldt Harbor and Bay, Santa Barbara Harbor, Channel Islands Harbor, Los Angeles and Long Beach Harbors. *Id.* §§ 101(a)(2), (4), (6), 305, 307, 310; 10 Stat. at 3663, 3712-13.

In its complaint, the California State Water Resources Board ("State Board"), a state agency responsible for the coordination and control of water quality, seeks to collect from the United States assessments imposed by various sections of the California Water Code ("CWC") in connection with the Corps' dredging activities in California.

One category of assessments arises under § 13260 of the CWC, and the other under § 13396.5.

Section 13260(a)(1) mandates that "[a]ny person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state" file a report of the discharge with the State Board. Section 13260(d)(1) requires that each person for whom waste discharge requirements ("WDRs") have been prescribed shall pay up to $10,000 on an annual basis to the State Board. The actual payment is determined according to a fee schedule established by the State Board and is to be "calculated on the basis of total flow, volume, number of animals, or area involved." § 13260(d)(1). All such payments are deposited in the

Water Discharge Permit Fund, which is generally available for expenditure by the State Board, upon appropriation by the Legislature, "for *inter alia*, programs to control the quality of all waters of the state, and to protect water quality from degradation." (Compl. ¶ 9, *citing* CWC § 13000.) Failure to pay the assessments under § 13260 constitutes a misdemeanor and can result in civil penalties of up to $5,000 per day. CWC § 13261. California seeks payment of these assessments and penalties from 1989 to the present.

Section 13396.5(a), which is part of the Bay Protection and Toxic Cleanup Program ("BPTCP"),[1] requires the State Board to "establish fees applicable to all point and nonpoint dischargers who discharge into enclosed bays, estuaries, or any adjacent waters in the contiguous zone or the ocean. . . . " Section 13396.5(d) requires dischargers to pay up to $30,000 annually, in addition to any assessment owed under § 13260. Failure to pay these BPTCP fees constitutes a misdemeanor and could result in civil penalties of up to $25,000 per day. CWC § 13396.5(e). California seeks payment pursuant to § 13396.5 from 1989 through its repeal at the end of 1997.

In sum, California seeks approximately $572,000 plus interest for the corps' past dredging activities, pursuant to §§ 13260 and 13396.5. California also seeks a declaratory judgment that such assessments are in compliance with applicable laws and the United States Constitution.

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[1] The BPTCP was repealed by its own terms on January 1, 1998. § 13396.5(h).

The United States claims that it has not waived its sovereign immunity for such assessments, and that these assessments constitute an unconstitutional tax under the Supremacy Clause.

II.

The United States has not waived sovereign immunity for the types of assessments at issue here. Therefore, the United States' motion to dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure[2] is granted.

It is well established that "[t]he United States is immune from suit unless it consents to waive its sovereign immunity." *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir. 1997) (citation omitted), *cert. denied*, 118 S. Ct. 62 (1997). Any such waiver must be unequivocally expressed. *Id.* Furthermore, a waiver of sovereign immunity must be strictly construed in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.* (citation omitted). Finally, there must be a clear and unambiguous waiver of sovereign immunity where a state attempts to regulate the federal government. *Hancock v. Train*, 426 U.S. 167, 179 (1976).

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[2] Because the Court finds that there has been no waiver of sovereign immunity it does not reach the United States' argument that these assessments constitute illegal taxes.

The Supreme Court has set what appears to be an even higher threshold for waiver of federal sovereign immunity to state environmental regulations. In *United States Department of Energy v. Ohio*, 503 U.S. 607, 623-27 (1992) (hereinafter cited as *DOE*), the Supreme Court concluded that 33 U.S.C. 1323(a)'s straightforward language permitting states to impose "civil penalties," against the federal government was not an "unequivocal" waiver of sovereign immunity. *Id.*

Moreover, the Court determined that language in 42 U.S.C. § 6961 of the Resource Conservation and Recovery Act ("RCRA") waiving federal immunity for "all [state environmental] requirements" did not give Ohio the right to collect punitive fees from the federal government. *DOE*, 503 U.S. at 627-28. In so holding, the *DOE* Court emphatically restated the rule that "any waiver of the National Government's sovereign immunity must be unequivocal . . . and not 'enlarge[d] . . . beyond what the language requires.' " *Id.* at 615 (internal quotation marks and citation omitted).

A.

Behind this backdrop of the stringent requirements necessary to establish a waiver of federal sovereignty, the Court now turns to California's arguments that the United States has waived immunity for California's dredging assessments. California relies on two provisions of the Clean Water Act ("CWS"), namely, § 404(t), 33 U.S.C. 1344(t) and § 313(a), 33 U.S.C. § 1323(a), to support

its argument that the United States has waived immunity for California's dredging fees.[3]

The Court begins with the argument for waiver based on § 404(t). This section specifically addresses dredging, and provides in relevant part:

> Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, *and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements.*

33 U.S.C. § 1344(t) (emphasis added).

California asserts, that the language in § 1344(t) providing that any federal agency "shall comply with . . . state requirements both procedural and substantive to control the discharge of dredged or fill material"

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[3] The United States also provides some statutory history as proof that Congress intended monetary fees to be included within § 4040(t). It is, however, improper for the Court to consider such material. The Supreme Court has determined that the legislative history of a statute cannot supply a waiver of sovereign immunity that does not clearly appear within the statutory text. *Lane v. Pena*, 518 U.S. at 192 (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992)).

constitutes a waiver of federal sovereign immunity with respect to California's dredging assessments.[4]

The Court finds this argument unpersuasive given the holding in *DOE*, discussed above. 503 U.S. at 627. In *DOE*, the State of Ohio argued that the phrase "all requirements" in RCRA at 42 U.S.C. § 6961, amounted to a clear and equivocal waiver of federal sovereign immunity with regard to punitive fines. *Id.* at 620, 627. The Court explicitly rejected this reasoning, finding that the narrow waiver went no further than "the coercive variety" of remedies, such as injunctions or similar decrees or orders compelling compliance with regulations or laws. *Id.* The Court reasoned as follows:

> We . . . agree with the Tenth Circuit that "all . . . requirements" can reasonably be interpreted as including *substantive standards and the means for implementing those standards but excluding punitive measures.*
>
> [Substantive requirements] can refer to either mechanisms requiring review for substantive compliance (permit and reporting requirements) or to mechanisms for enforcing substantive

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[4] California also urges the Court to find a waiver of immunity for its "assessments" in § 1344(t) by labeling them "service charges." The phrase "service charges" is not mentioned anywhere in § 1344(t). Without more, this characterization falls far short of the clear and unequivocal waiver required to strip the federal government of sovereign immunity. Simple logic would dictate that any argument for waiver would be confined to 33 U.S.C. § 1323(a), because that provision at least mentions "service charges." *See* discussion *infra* Part B, regarding argument for waiver under § 1323(a).

> requirements in the future (injunctive relief and sanctions to enforce it).

Id. at 627-28 (internal quotation marks and citation omitted).[5]

The fees at issue here are not directly related to compliance mechanisms to implement substantive state dredging or discharge requirements. Instead, the assessments are collected from individuals or governments engaged in dredging activities *regardless* of their future or past record of compliance with substantive state effluent standards. In that sense, they more closely resemble the impermissible punitive fees discussed in *DOE*.

In oral argument, California admitted that the Corps pays a nominal fee to have its California dredging application processed. In addition, the Corps must file waste discharge reports with California regarding its dredging activities. *See* CWC § 13260(d) (reporting requirements

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[5] The State Board argues that *DOE* is distinguishable from this case, because here, California does not seek punitive fines or civil penalties from the United States. Rather, it contends that it seeks reimbursement for unpaid reasonable service charges that all dischargers, including the Corps, must pay. (California's Supp. Br. at 2:4-11.)

The teaching of *DOE* is not limited to the issue of punitive fines. The rule of law articulated in *DOE* states that a waiver of sovereign immunity must be clear and unequivocal. One of the very provisions at issue here, 33 U.S.C. § 1323(a), authorizing states to collect penalties from agencies of the federal government was not given effect because it lacked sufficient clarity. *See DOE*, 503 U.s. at 635 (White, J.) (concurring in part, dissenting in part) (arguing that the majority's distortion of the CWA "leaves the phrase 'civil penalties arising under Federal law' devoid of meaning").

for dischargers). The ministerial reporting and application fees are separate and distinct from the $10,000 and $30,000 annual assessments that California collects from waste dischargers and dredgers under §§ 13260 and 13396.5 of the CWC. The large annual assessments cannot be characterized as "procedural or substantive" requirements for the discharge of dredge fill material. Their primary function is to penalize, or at least render very costly, lawful dredging activities.

California's assessments do not fit within § 1344(t)'s narrow waiver of immunity discussed in *DOE*. 503 U.S. at 627-28. The assessments bear no relationship to necessary reporting or compliance costs. They do not qualify as nonmonetary coercive sanctions used to compel compliance with an injunction. Because California has not met its burden of showing a clear and unequivocal waiver as required by *DOE*, its argument for waiver of sovereign immunity predicated on the "requirements" language in § 1344(t) fails.

In the face of adverse Supreme Court precedent, the State Board perseveres by pointing to cases decided before *DOE* – in particular *United States v. South Coast Air Quality Management District*, 748 F. Supp. 732 (C.D. Cal. 1990). California relies on *South Coast* to claim that the waiver of sovereign immunity in § 1344(t) is "extremely broad," "all-inclusive," and "expansive," and that the state assessments at issue fall within the "requirements" provision that waives federal sovereignty.

In *South Coast*, the district court held that language in § 118(a) of the Clean Air Act ("CAA") waiving federal immunity for "all requirements" constituted a broad

waiver of sovereign immunity that authorized California to collect fees from the United States.[6] *Id.* at 740. Here, California asks the Court to find a similar waiver based on § 1344(t)'s language that the United States comply with state "equirements."

South Coast is of limited significance to this case, and does not govern. The stringent test set forth in *DOE* predates *South Coast* and effectively overrules its holding that compliance with state requirements effects a waiver of immunity against state fees. Not surprisingly then, *South Coast* has never been cited by any circuit court for such a proposition.

Given the extremely precise waiver required to waive federal sovereign immunity, California cannot recover fees for the "cost of doing the business of dredging" in California by relying on the word "requirements" in § 1344(t). Therefore, the Court finds that § 1344(t) does not waive federal immunity for California's dredging assessments levied under §§ 13260 and 13396.5 of the CWC.

B.

The other section upon which California relies is § 313(a) of the CWA, which provides in relevant part:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . (2) engaged in

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[6] Section 118(a) of the CAA was codified at 42 U.S.C. § 7418(a). Congress amended this statute in 1990 to add a more explicit waiver. Pub. L. 101-549, § 235 (1990).

> any activity resulting, or which may result, in the discharge or runoff of pollutants . . . *shall be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.*

33 U.S.C. § 1323(a) (emphasis added).

First, it is not clear that § 1323(a) is the appropriate place to find a clear and unequivocal waiver. California admits that 33 U.S.C. § 1344(t), which is discussed above, specifically addresses dredging activities and that, naturally, any waiver of immunity would likely be found there. It nevertheless argues, alternatively, that § 1323(a) also applies to the Corps' dredging activities because § 1323(a) is directed at reducing discharge or runoff of pollutants from dredging. California asserts that the Corps' has disturbed toxic hot spots and thereby caused runoff pollution by dredging in California waterways. (*See* Compl. at ¶ 12.) Under California's reasoning, any language subjecting the federal government to state "requirements" and "service charges" under § 1323(a) should be given effect even if no waiver is found in § 1244(t)'s waiver for certain state dredging requirements.

The Court is not, however, persuaded by this argument. California may not carry its burden of showing a clear and unequivocal waiver by presenting various sections of the United States Code referencing the words "requirements" and service charges." The argument that waiver of immunity can be found in a section that deals

only tangentially with dredging assessments would essentially render § 1344(t)'s narrower waiver superfluous. It must be remembered that "the more natural reading of the statute's text, which would give effect to all its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 550 (1996).

Nonetheless, even assuming that § 1323(a) *could* apply to California's assessments on the theory that they are service charges levied under § 1323(a) of the CWA, there is no waiver because (1) the term "requirements" does not meet the clear and equivocal standard for waiver and (2) assessments at issue here are not "service charges" because no service [sic] are in fact rendered in return for the charges or assessments.

1.

To support its argument that federal sovereignty has been waived in § 1323(a), California points specifically to language that requires the United States to comply with all state "requirements," including "the payment of reasonable service charges." *Id.*

The Court dispenses with California's argument that the "requirements" language in § 1323(a) waives sovereign immunity by referring to its earlier discussion on that issue. (*See* discussion Section II.A.) The Court finds, as it did with 33 U.S.C. § 1344(t), that the "requirements" language of § 1323(a) is insufficient to effect a waiver of federal sovereign immunity. Again, the teaching of *DOE* is instructive. It dealt with precisely this issue – whether

a waiver for certain monetary payments could be found in the "requirements" language of § 1323(a). The *DOE* Court discussed this provision, stating:

> Whereas we commonly understand that "requirements" may be enforced either by backward-looking penalties for past violations or by the "process" of forward-looking orders enjoining future violations, such forward-looking orders themselves are characteristically given teeth by equity's traditional coercive sanctions for contempt: fines and bodily commitment imposed pending compliance or agreement to comply. *The very fact, then, that the text speaks of sanctions in the context of enforcing "process" as distinct from substantive "requirements" is a good reason to infer that Congress was using "sanction" in its coercive sense, to the exclusive of punitive fines.*

503 U.S. at 623 (emphasis added).

The payments here are not coercive in any sense of the word because they are not intended to secure the United State' [sic] compliance with an injunction, for the reasons discussed above. The Court finds that the United States is immunized from any liability for fines or assessments that California seeks arising out of the Corps' dredging activities, and the term "requirements" language of § 1323(a) does not serve to waive federal sovereign immunity for these assessments.

2.

California argues that even if the phrase "requirements" in § 1323(a) does not waive federal sovereignty

for its assessments, the term "service charges" in that section makes clear that Congress did intend to authorize states to collect assessments for activities like dredging. The United States maintains, on the other hand, that the assessments are not service charges as California argues, but rather are actually an attempt to impose an unconstitutional tax on the United States. Here, the Court must decide what legal test should be used to determine whether the charges levied by California against the United States are permissible service charges akin to "user fees" or unconstitutional taxes.

a.

At a minimum, the term "service charges" presupposes the provision of some type of service or benefit. Beyond that, the meaning of the term is unclear. Because of this ambiguity, the characterization of California's assessments is crucial as to their constitutionality, because the United States' immunity from state taxation is a Constitutional imperative rooted in the Supremacy Clause. *See United States v. Massachusetts,* 435 U.S. 444, 455 (1978) (citing *McCullough v. Maryland,* 4 Wheat. 316 (1819)).

The Supreme Court addressed the meaning and breadth of the term "service charges" in *Environmental Protection Agency v. California ex rel State Water Resources Control Board,* 426 U.S. 200 (1976). In *California ex rel,* the Court considered whether the term "reasonable service charges" in § 1323 (1970 ed., Supp. IV) (an earlier version of the current CWA) authorized states to impose permit

requirements on federal installations discharging pollutants within the state. *Id.* at 201-02. The Court recognized that the term "service charges" used in § 313 of the CWA lacked a statutory definition. *Id.* at 216 & n.29. It also noted that the legislative history on the meaning of "service charges" is silent. *Id.* at 216 & n.29. This lack of "clarity" led the Court to hold that the term "reasonable service charges" did not give states the power to impose state permitting requirements on the United States. *Id.* at 227. In so ruling, the Court did note that the [sic] "the term 'service charges' *might* as well be taken to refer to recurring charges for performing a service such as treating sewage" and that such a construction was not unreasonable. *Id.* at 217. This *dicta* in *California ex rel.* offers limited guidance to the Court on how to resolve the dispute over California's assessments in this case.

The other Supreme Court case bearing on this issue is *Massachusetts.* 435 U.S. 444. *Massachusetts* does not deal specifically with the meaning of "service charges" in the CWA. It does, however, analyze the difference between user fees and taxes, and their relationship to sovereign immunity. Because this decision forms a significant basis for decision here, the Court set forth a lengthy examination of this case.

In *Massachusetts,* the state challenged the constitutionality of a federal aviation program requiring states operating civil aircraft to pay various fees, including an annual "flat fee" registration tax. *Id.* at 449. Massachusetts argued that these fees and taxes violated the implied immunity of a state government from federal taxation. *Id.* at 446-52.

The Supreme Court held that civil aircraft "taxes" were constitutionally permissible "user fees" that did not violate the Commerce Clause or implied state tax immunity. *Id.* at 460-63. The Court reasoned that the civil aircraft fees that the federal government collected from states were used to defray the costs of federal aviation programs that directly benefited the states. *Id.* at 461-62. In return for their fees, state-owned aircraft received the tangible benefit of using federal navigational facilities and airports. *Id.* at 468.

The Court found congressional intent about the nature of the fees persuasive on the question of whether to characterize fees as taxes or user charges. Congress regarded the fees as "an integral and essential part of the network of [FAA] user charges." *Id.* at 451. The Court also examined the comprehensive nature of the federal aviation program and how the fees were used in determining that the federal government's assessments against Ohio were in fact service charges and not taxes. It analyzed the government's interests and the nature of the program, and the effect that both had on the question of sovereign immunity and the commerce clause, noting:

> A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost and, provided that the charge is structured to compensate the government for the benefit conferred, there can be no danger of the kind of interference with constitutionally valued activity that the [the Commerce Clause and clause 3, § 10 of Article I prohibiting states from charging vessels from entering or trading in ports] were designed to prohibit.

Id. at 462-63. Central to the *Massachusetts* holding was the fact that the federal government supplied obvious "services" to Massachusetts in return for the user fees. The connection between the assessments and the provision of actual services was central to the Court's determination that the fees did not violate state sovereign immunity.

The Court still, however, had to decide how these user fees operated in fact, regardless of how they were characterized. *Id.* at 463. The Court set forth a three-prong test used to decide whether a federal regulatory fee imposed on states was an impermissible tax that had no relationship to the services or a permissible tax (or, to use the FAA's term, "user fee") that represents a fair approximation of the benefits provided. *Id.* at 466-67. This test asks: (1) is the fee nondiscriminatory with regard to governmental functions; (2) is the fee a fair approximation of the costs of the benefits from the activity or service; and (3) is the fee excessive in relation to the benefits supplied? *Id.* After applying these factors, the Court concluded that the FAA's user fees did not violate state sovereign immunity.

b.

The precedential value of the *Massachusetts* test to cases that involve federal immunity from state assessments (which is the case here) is the focus of some dispute among the courts. When confronted with federal liability for state service charges or user fees, some courts have relied on the test set forth in *Massachusetts*, to decide whether the United States has waived sovereign immunity for fees under federal environmental statutes such as

the CWA. *See Maine v. Department of Navy*, 973 F.2d 1007 (1st Cir. 1992); *New York State Dept. of Envt'l Conservation v. United States Dept. of Energy*, 850 F. Supp. 132 (N.D.N.Y. 1994). Outside the environmental context, the Fourth and Eighth Circuit courts have declined to use the *Massachusetts* test, noting that *Massachusetts* involved *state* immunity from federal taxation and, thus, is of limited significance in cases that involve federal immunity from state taxation or regulatory fees. *See United States v. City of Huntington*, 999 F.2d 71, 73 n.5 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *United States v. City of Columbia*, 914 F.2d 151, 153 (8th Cir. 1990).

The circuits rejecting the *Massachusetts* test have fashioned their own legal test to determine whether an assessment is a tax or a fee. The Eighth Circuit in *City of Columbia* simply considers "all the facts and circumstances of record in the case [to] assess them on the basis of economic realities [and the] essential nature of [the state program]." 914 F.2d at 154. The Fourth Circuit follows the *City of Columbia* "facts and circumstances" test. *See City of Huntington*, 999 F.2d at 73. No court in the Ninth Circuit has addressed this issue. The parties urge this Court to adopt the "facts and circumstances test" of *Columbia*.

After carefully considering the partes' [sic] arguments, the Court chooses to apply the *Massachusetts* test in this case to decide whether California's assessments are service charges or taxes or penalties to which the United States is immune. The Court appreciates that *Massachusetts* involved the issue of state immunity, not federal immunity. The Court also recognizes that "federal immunity has

always been greater than the States' immunity," because federal immunity arises from the explicit language of the Supremacy Clause. *South Carolina v. Baker,* 485 U.S. 505, 520 n.11 (1988). The two doctrines' separate and distinct constitutional sources counsel against any wholesale importation of state sovereign immunity precedent to decide cases involving federal sovereign immunity.

The reasoning supporting the *Massachusetts* decision extends farther than its particular holding. In an area where the legal landscape is virtually barren, the *Massachusetts* test provides a useful analytic framework to guide this Court on the distinction between service charges and impermissible taxes. The line separating taxes and user fees or service charges is difficult to draw. The distinction between the two is frequently one of degree. The fundamental difference between the two rests on the concept of proportionality. *See* 435 U.S. at 466-67.

A permissible user fee can still run afoul of the United States Constitution if it is grossly disproportionate to the services supplied. *Id.* In fact, California's argument essentially attacks the fees on the grounds of proportionality, arguing that they are not fees because they have absolutely no connection to services or benefits. (*See* United States' Am. Mot. to Dismiss at 13 (arguing that the fees are not correlated to any services, because the WDR and BPTCP fees are placed in a general fund and are not linked to water-quality service or related to permitting requirements or other related activity).)

The factors drawn from *Massachusetts* reflect the Supreme Court's attempt to grapple with the question of proportionality. For instance, the first factor insures that

the fee is nondiscriminatory and spread equitably among governmental units. The question of proportionality is also encompassed in the second and third factors, which includes an analysis of the amount of the fee to the costs and benefits supplied and whether the fee is excessive in relation to those benefits. *See id.* at 466-67. The *Massachusetts* test provides a useful starting point to resolving the particular issues raised here. Accordingly, the Court will apply the *Massachusetts* three-prong test to California's WDR and BPTCP fees to determine their constitutionality.

The Court chooses not to adopt the Fourth and Eighth Circuit's alternative "all the facts and circumstances" test. This test would essentially amount to a case-by-case determination of this important issue that could lead to uncertainty for both the states and the federal government, because it commits the resolution of this complex issue to the discretion of individual judges.

b.

Applying the three factors in *Massachusetts*, these fees do in fact appear to be excise taxes designed to discourage dredging. The first factor, which asks whether the charge is discriminatory, tends to show that the fee here is in the nature of a user fee. There is no dispute between the parties that the fee is imposed uniformly and fairly and that the United States is not being unfairly burdened by this assessment relative to other governmental units.

California's assessment fails to satisfy the second prong of the *Massachusetts* test. The assessments that California has imposed on the Corps' dredging activities

do not represent a fair approximation of the benefits or services provided. No services or benefits are provided to the federal United States whatsoever. "Incentives" to discourage dredging do not qualify as a service nor a benefit. Assessments that are intended to discourage an activity are in the nature of taxes, rather than fees. *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 341 (1974).

Finally, as to the third *Massachusetts* factor, the WDR and BPTCP fees sought from the United States can only be viewed as excessive because no services are in fact provided in return for payment of the service charges. Fees that are imposed to merely fund compliance efforts and to encourage less dredging stretch the meaning of "service charge" too far. In *Massachusetts*, distinct services were provided at airports. 444 U.S. at 467-68. Every aircraft subject to the fee received navigational assistance and other special services supplied by the United States. *Id.* at 468. The costs of compliance with federal aviation laws was not the basis for the user fee approved in *Massachusetts*. Thus, California's fees, which are used as creative incentives or to insure compliance with California's dredging laws, may not be viewed as "service charges" or even "user fees."

Based on a careful application of the *Massachusetts* test, the Court holds that California's dredging fees do not qualify as "service charges" for which the United States has waived its sovereign immunity under § 1323(a) of the CWA.

California argues, nonetheless, that its dredging assessments are used to fund compliance programs and,

therefore, the assessments operate as permissible regulatory fees, not taxes prohibited by the Supremacy Clause. California relies for this proposition on *State of Maine v. Department of Navy*, 973 F.2d 1007 (1st Cir. 1992), to support this claim.

In that case, Maine brought suit against the Navy to recover fees under the RCRA. 42 U.S.C. § 6961. As discussed above, § 6961 contains a proviso subjecting the United States to "reasonable service charges." The Navy argued that it was immune from a Maine statute imposing a $500 licensing fee and a two cents per pound generating fee for solid waste because the federal government had waived its immunity only with respect to reasonable fees, not the unreasonable fees imposed under the Maine statute. The *Maine* court upheld the district court's denial of the Navy's motion for summary judgment, holding that the evidence did not establish that the fees at issue were unreasonable as a matter of law. *Id.* at 1013-14. The court also held that the holding of *DOE* precluded *Maine* from recovering a penalty for overdue fees. *Id.* at 1015 (citing *DOE*, 503 U.S. at 612).

California points to the portion of the *Maine* decision discussing in detail the purpose of Maine's solid waste fees. The First Circuit noted that Maine's fees were not designed simply to raise money for general revenue purposes, but were like "classic regulatory fees" imposed by an agency that are used to raise money to help defray the agency's regulation-related expenses. *Id.* at 1012. Money assessed by Maine was used by the state to pay salaries and other costs of personnel equipment used to supervise and enforce state hazardous waste laws, including costs of site inspections and clean up of hazardous spills. *Id.* at

1014. California emphasizes that the First Circuit in *Maine* characterized Maine's rapid spill response program as a "service" that warranted the assessment of service fees against the federal government.[7] (California's Supp. Br. at 4.)

California argues that, just like the rapid response services funded by hazardous waste disposal fees, its water quality monitoring and compliance programs are "services" provided to the Corps that are funded by payments collected from dredging activities. Therefore, California asserts, the activities that California funds with dredging fees serve to transform them into allowable "service charges" that fit within 1323(a)'s waiver of immunity. (*Id.* at 5-8.)

The portion of *Maine* upon which California relies did not address the distinction between fees and penalties and, therefore, does not aid the Court's decision in this case. *See Maine*, 973 F.2d at 1013. This part of the

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[7] The passage upon which California places special reliance is provided below:

> But the presence of a state spill response team does more than provide a general benefit. It also benefits the regulated entities in a special way. It helps to *ensure their compliance* with state goals and standards for prompt clean ups. In our view, a state spill response team (perhaps like airplane safety inspectors, or crash investigators, or special airport rescue teams) bears a close enough relationship to the regulatory process as to permit a state's assessing regulating entities that may cause spills a special charge for its support.

Maine, 973 F.2d at 1013 (emphasis added by plaintiff).

Maine decision concerned the reasonableness of Maine's fees. *Id.* at 1012-1015. The Navy in that case *conceded* that the assessments at issue were in fact service charge fees, not penalties. *Id.* at 1011. The Navy, however, claimed that it had waived sovereign immunity only for reasonable fees and argued that Maine's fees were unreasonable as a matter of law. *Id.* at 1011.

The portion of the *Maine* opinion that California cites is specifically limited to the reasonableness issue. The Court held: "Congress said nothing in either the statute or its history that suggests a willingness to have the federal government pay *unreasonable fees*. To the contrary, Congress, in the statute itself, said that the requirements to which it subjected the federal government 'include] the payment of reasonable service charges.' " *Id.* at 1012.

The issues in this case are quite different. Here, the United States strenuously asserts that the funds that California seeks are in fact penalties, not service charges. The United States makes no concession, and specifically informs the Court that it is not attacking the reasonableness of California's fees. Accordingly, the *Maine* case does not support California's argument that the fees it wishes to recover from the United States are service charges that are not barred by federal immunity.

In sum, because neither § 1344(t) nor § 1323(a) evince congressional intent to waive federal immunity for California's waste discharge fees or BPTC fees, the Court grants the United States' motion to dismiss. The annual assessments in question are prohibited by the Supremacy Clause of the United States Constitution.

III.

Accordingly,

IT IS HEREBY ORDERED that the United States' motion to dismiss is GRANTED.

Dated: January 12, 1999.

/s/ William H. Orrick
William H. Orrick
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, Acting by and through the California State Water Resources Control Board, Plaintiff, vs. UNITED STATES OF AMERICA, et al., Defendants.	No. C-98-0792 WHO JUDGMENT (Filed Jan. 12, 1999)

This matter having come before the Court, and the issues having been duly presented, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that defendant United States of America's motion to dismiss is GRANTED.

Dated: January 12, 1999.

/s/ William H. Orrick
William H. Orrick
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, Acting by and through the California State Water Resources Control Board, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF ENGINEERS, Defendants-Appellees. STATE OF NEW YORK, amicus, Amicus.	No. 99-15279 D.C. No. CV-98-00792-WHO ORDER (Filed Apr. 2, 2001)

Before: GOODWIN, BRUNETTI and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Thomas votes to reject the suggestion for rehearing en banc and Judges Goodwin and Brunetti so recommend.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

§ 13020. Title of division

This division shall be known and may be cited as the Porter-Cologne Water Quality Control Act.

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§ 13050

* * *

(C) Any discharge to surface water of a quantity less than a reportable quantity as determined by regulations issued pursuant to Section 311(b)(4) of the Clean Water Act.

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§ 13260. Reports; actual or proposed waste discharge; fees; regulations; mining wastes; exemptions; memorandum of understanding

(a) All of the following persons shall file with the regional board of that region a report of the discharge, containing the information which may be required by the regional board:

(1) Any person discharging waste or proposing to discharge waste within any region that could affect the quality of the waters of the state, other than into a community sewer system.

(2) Any person who is a citizen, domiciliary, or political agency or entity of this state discharging waste or proposing to discharge waste outside the boundaries of the state in a manner that could affect the quality of the waters of the state within any region.

(3) Any person operating or proposing to construct an injection well.

(b) No report of waste discharge need be filed pursuant to subdivision (a) if the requirement is waived pursuant to Section 13269.

(c) Every person subject to subdivision (a) shall file with the regional board of that region a report of waste discharge relative to any material change or proposed change in the character, location, or volume of the discharge.

(d)(1) Each person for whom waste discharge requirements have been prescribed pursuant to Section 13263 shall submit an annual fee not to exceed ten thousand dollars ($10,000) according to a reasonable fee schedule established by the state board. Fees shall be calculated on the basis of total flow, volume, number of animals, or area involved.

(2) Any fees collected pursuant to this section shall be deposited in the Waste Discharge Permit Fund which is hereby created. The money in the fund is available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this division.

(e) Each report of waste discharge for a new discharge submitted under this section shall be accompanied by a fee equal in amount to the annual fee for the discharge. If waste discharge requirements are issued, the fee shall serve as the first annual fee. If waste discharge requirements are waived pursuant to Section 13269, all or part of the fee shall be refunded.

(f)(1) On or before January 1, 1990, the state board shall adopt, by emergency regulations, a schedule of fees authorized under subdivisions (d) and (j). The total revenue collected each year through annual and filing fees shall be set at an amount equal to the revenue levels set forth in the Budget Act for this activity. The state board shall automatically adjust the annual and filing fees each fiscal year to conform with the revenue levels set forth in the Budget Act for this activity. If the state board determines that the revenue collected during the preceding year was greater than or less than the revenue levels set forth in the Budget Act, the state board may further adjust the annual filing fees to compensate for the over and under collection of revenue.

(2) The emergency regulations adopted pursuant to this subdivision, or subsequent adjustments to the annual fees, shall be adopted by the state board in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government code. The adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any emergency regulations adopted by the state board, or adjustments to the annual fees made by the state board pursuant to this section, shall not be subject to review by the Office of Administrative Law and shall remain in effect until revised by the state board.

(g) The state board shall adopt regulations setting forth reasonable time limits within which the regional

board shall determine the adequacy of a report of waste discharge submitted under this section.

(h) Each report submitted under this section shall be sworn to or submitted under penalty of perjury.

(i) The regulations adopted by the state board pursuant to subdivision (f) shall include a provision that annual fees shall not be imposed on those who pay fees under the National Pollutant Discharge Elimination System until the time when those fees are again due, at which time the fees shall become due on an annual basis.

(j) Facilities for confined animal feeding or holding operations, including dairy farms, which have been issued waste discharge requirements or exempted from waste discharge requirements prior to January 1, 1989, are exempt from subdivision (d). If the facility is required to file a report under subdivision (c) after January 1, 1989, the report shall be accompanied by a filing fee, to be established by the state board in accordance with subdivision (f), not to exceed two thousand dollars ($2,000), and the facility shall be exempt from any annual fee.

(k) Any person operating or proposing to construct an oil, gas, or geothermal injection well subject to paragraph (3) of subdivision (a), shall not be required to pay a fee pursuant to subdivision (d), if the injection well is regulated by the Division of Oil and Gas of the Department of Conservation, in lieu of the California regional water quality control board for the region, pursuant to the memorandum of understanding, entered into between the State Water Resources Control Board and the Department of Conservation on May 19, 1988. This subdivision shall remain operative until the memorandum of

understanding is revoked by the State Water Resources Control Board or the Department of Conservation.

(*l*) In addition to the report required by subdivision (a), before any person discharges mining waste, the person shall first submit the following to the regional board:

(1) A report on the physical and chemical characteristics of the waste that could affect its potential to cause pollution or contamination. The report shall include the results of all tests required by regulations adopted by the state board, any test adopted by the Department of Toxic Substances Control pursuant to section 25141 of the Health and Safety Code for extractable, persistent, and bioaccumulative toxic substances in a waste or other material, and any other tests that the state board or regional board may require, including, but not limited to, tests needed to determine the acid-generating potential of the mining waste or the extent to which hazardous substances may persist in the waste after disposal.

(2) A report that evaluates the potential of the discharge of the mining waste to produce, over the long term, acid mine drainage, the discharge or leaching of heavy metals, or the release of other hazardous substances.

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§ 13261. Failure to furnish report or pay fee; false report; civil liability

(a) Any person failing to furnish a report or pay a fee under section 13260 when so requested by a regional

board is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).

(b)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars ($1,000) for each day in which the violation occurs.

(2) Civil liability may be imposed by the superior court in accordance with Article 5 (commencing with Section 13350) and Article 6 (commencing with Section 13360) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed five thousand dollars ($5,000) for each day in which the violation occurs.

(c) Any person discharging or proposing to discharge hazardous waste, as defined in Section 25117 of the Health and Safety Code, who knowingly furnishes a false report under Section 13260, or who either willfully fails to furnish a report or willfully withholds material information under Section 13260 despite actual knowledge of such requirement, may be liable in accordance with subdivision (d) and is guilty of a misdemeanor.

This subdivision shall not be applicable to any waste discharge which is subject to Chapter 5.5 (commencing with Section 13370).

(d)(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (c) in an amount which shall not

exceed five thousand dollars ($5,000) for each day in which the violation occurs.

(2) Civil liability may be imposed by the superior court in accordance with Article 5 (commencing with Section 13350) and Article 6 (commencing with Section 13360) of Chapter 5 for a violation of subdivision (c) in an amount which shall not exceed twenty-five thousand dollars ($25,000).

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§ 13263. Prescribing requirements; considerations by regional board

(a) The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change therein, except discharges into a community sewer system, with relation to the conditions existing from time to time in the disposal area or receiving waters upon or into which the discharge is made or proposed. The requirements shall implement relevant water quality control plans, if any have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.

(b) A regional board, in prescribing requirements, need not authorize the utilization of the full waste assimilation capacities of the receiving waters.

(c) The requirements may contain a time schedule, subject to revision in the discretion of the board.

(d) The board may prescribe requirements although no discharge report has been filed.

(e) Upon application by any affected person or on its own motion, the regional board may review and revise requirements. All requirements shall be reviewed periodically.

(f) The regional board shall notify in writing the person making or proposing the discharge or the change therein of the discharge requirements to be met. After receipt of such notice, the person so notified shall provide adequate means to meet such requirements.

(g) No discharge of waste into the waters of the state, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharge. All discharges of waste into waters of the state are privileges, not rights.

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§ 13267. Investigation of water quality; reports; inspection of facilities

(a) A regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement or authorized by this division, may investigate the quality of any waters of the state within its region.

(b) In conducting an investigation specified in subdivision (a), the regional board may require that any person discharging or proposing to discharge waste within its region or any citizen or domiciliary, or political agency or entity of this state discharging or proposing to discharge waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, those technical or monitoring program reports as the board may specify. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.

When requested by the person furnishing a report, the portions of a report which might disclose trade secrets or secret processes shall not be made available for inspection by the public but shall be made available to governmental agencies for use in making studies. However, these portions of a report shall be available for use by the state or any state agency in judicial review or enforcement proceedings involving the person furnishing the report.

(c) In conducting an investigation pursuant to subdivision (a), the regional board may inspect the facilities of any person to ascertain whether the purposes of this division are being met and waste discharge requirements are being complied with. The inspection shall be made with the consent of the owner or possessor of the facilities or, if the consent is refused, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure. However, in the event of an emergency affecting the public health or safety, an inspection

may be made without consent or the issuance of a warrant.

(d) The state board or a regional board may require any person, including a person subject to a waste discharge requirement under Section 13263, who is discharging, or who proposes to discharge, wastes or fluid into an injection well, to furnish the state board or regional board with a complete report on the condition and operation of the facility or injection well, or any other information that may be reasonably required to determine whether the injection well could affect the quality of the waters of the state.

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§ 13304. Cleanup or abatement order; injunction; remedial action by governmental entity; expenditures; contracts; payment of costs

(a) Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up such waste or abate the effects thereof or, in the case of threatened pollution or

nuisance, take other necessary remedial action. Upon failure of any person to comply with such cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring such person to comply therewith. In any such suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

(b) The regional board may expend available moneys to perform any cleanup, abatement, or remedial work required under the circumstances set forth in subdivision (a) which in its judgment is required by the magnitude of endeavor or urgency of prompt action needed to prevent substantial pollution, nuisance, or injury to any waters of the state. Such action may be taken in default of, or in addition to, remedial work by the waste discharger or other persons, and regardless of whether injunctive relief is being sought. The regional board may perform the work itself, or by or in cooperation with any other governmental agency, and may use rented tools or equipment, either with operators furnished or unoperated. Notwithstanding any other provisions of law, the regional board may enter into oral contracts for such work, and the contracts, whether written or oral, may include provisions for equipment rental and in addition the furnishing of labor and materials necessary to accomplish the work. Such contracts shall be exempt from approval by the Department of General Services pursuant

to the provisions of Section 14780 of the Government Code.[1]

(c) If such waste is cleaned up, the effects thereof abated, or, in the case of threatened pollution or nuisance, other necessary remedial action is taken by any governmental agency, the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), shall be liable to that governmental agency to the extent of the reasonable costs actually incurred in cleaning up such waste, abating the effects thereof, or taking other remedial action. The amount of such costs shall be recoverable in a civil action by, and paid to, such governmental agency and the state board to the extent of the latter's contribution to the cleanup costs from the State Water Pollution Cleanup and Abatement Account or other available funds.

(d) If, despite reasonable effort by the regional board to identify the person responsible for the discharge of waste or the condition of pollution or nuisance, such person is not identified at the time cleanup, abatement, or remedial work must be performed, the regional board shall not be required to issue an order under this section.

(e) "Threaten," for purposes of this section, means a condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources.

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[1] Repealed. See Pub.Con.C. § 10295.

(f) This section does not impose any new liability for acts occurring before January 1, 1981, if the acts were not in violation of existing laws or regulations at the time they occurred.

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§ 13323. Complaint; hearing; action by regional board; orders

(a) Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or failure to act that constitutes a violation of law, the provision of law authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.

(b) The complaint shall be served by personal notice or certified mail, and shall inform the party so served that a hearing shall be conducted within 60 days after the party has been served. The hearing shall be before a panel of the regional board, consisting of three or more members of the regional board as it may specify, or before the regional board. The person who has been issued a complaint may waive the right to a hearing, in which case the regional board shall not conduct a hearing.

(c) After any hearing, the panel shall report its proposed decision and order to the regional board and shall, at the time it reports its decision to the regional board, supply a copy to the party served with the complaint, the party issuing the complaint, and any other person

requesting a copy. Members of the panel may sit as members of the board in deciding the matter. The regional board, after making an independent review of the record and taking such additional evidence as may be necessary and could not reasonably have been offered before the hearing panel, may adopt, with or without revision, the proposed decision and order of the panel.

(d) Orders setting administrative civil liability shall become effective and final upon issuance thereof, and payment shall be made within 30 days. Copies of these orders shall be served by personal service or by registered mail upon the party served with the complaint and upon other persons who appeared at the hearing and requested a copy.

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§ 13328. Judgment to collect penalty

After the time for judicial review under Section 13325 has expired, the state board may apply to the clerk of the appropriate court in the county in which the civil penalty was imposed, for a judgment to collect the penalty. The application, which shall include a certified copy of the state board or regional board action, constitutes a sufficient showing to warrant issuance of the judgment. The court clerk shall enter the judgment immediately in conformity with the application. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action,

and may be enforced in the same manner as any other judgment of the court in which it is entered.

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§ 13350. Civil Liabilities; recovery of amount; contribution; annual report

(a) Any person who (1) intentionally or negligently violates any cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of any waste discharge requirement or other order or prohibition issued, reissued, or amended by a regional board or the state board, intentionally or negligently discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state and creates a condition of pollution or nuisance, or (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other provisions of this division, may be liable civilly in accordance with subdivision (d), (e), or (f).

(b) Any person who, without regard to intent or negligence, causes or permits any hazardous substance to be discharged in or on any of the waters of the state where it creates a condition of pollution or nuisance, except in accordance with waste discharge requirements or other provisions of this division, shall be strictly liable civilly in accordance with subdivision (d), (e), or (f).

For purposes of this subdivision, the term "discharge" includes only those discharges for which Section 13260 directs that a report of waste discharge shall be filed with the regional board.

For purposes of this subdivision, the term "discharge" does not include any emission excluded from the applicability of Section 311 of the Clean Water Act (33 U.S.C. Section 1251 et seq.) pursuant to Environmental Protection Agency regulations interpreting Section 311(a)(2) of the Clean Water Act.

(c) There shall be no liability under subdivision (b) if the discharge is caused solely by any one or combination of the following:

(1) An act of war.

(2) An unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(3) Negligence on the part of the state, the United States, or any department or agency thereof: provided, that this paragraph shall not be interpreted to provide the state, the United States, or any department or agency thereof a defense to liability for any discharge caused by its own negligence.

(4) An intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(5) Any other circumstance or event which causes the discharge despite the exercise of every reasonable precaution to prevent or mitigate the discharge.

(d) When there is a discharge, and a cleanup and abatement order is issued pursuant to Section 13304, liability shall be imposed as follows:

(1) Civil liability may be administratively imposed by a regional board pursuant to Article 2.5 (commencing with Section 13323) for a violation of this section in an amount which shall not exceed five thousand dollars ($5,000), but shall not be less than five hundred dollars ($500), for each day in which the discharge occurs and for each day the cleanup and abatement order is violated.

(2) Civil liability may be imposed by the superior court in accordance with this article and Article 6 (commencing with Section 13360) for a violation of this section in an amount which shall not exceed fifteen thousand dollars ($15,000) for each day in which the discharge occurs and for each day the cleanup and abatement order is violated.

(e) When there is a discharge, and a cleanup and abatement order is not issued pursuant to Section 13304, liability shall be imposed as follows:

(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) for a violation of this section in an amount which shall not exceed ten dollars ($10) for each gallon of waste discharged.

(2) Civil liability may be imposed by the superior court in accordance with this article and Article 6 (commencing with Section 13360) for a violation of this section in an amount which shall not exceed twenty dollars ($20) for each gallon of waste discharged.

(f) When there is no discharge, but an order issued by the regional board is violated, liability shall be imposed as follows:

(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) for a violation of this section in an amount which shall not exceed one thousand dollars ($1,000), but shall not be less than one hundred dollars ($100), for each day in which the violation occurs.

(2) Civil liability may be imposed by the superior court in accordance with this article and Article 6 (commencing with Section 13360) for a violation of this section in an amount which shall not exceed ten thousand dollars ($10,000) for each day in which the violation occurs.

(g) A regional board shall not administratively impose civil liability in accordance with subdivision (d), (e), or (f) in an amount less than the minimum amount specified, unless the regional board makes express findings setting forth the reasons for its action based on the specific factors required to be considered pursuant to Section 13327.

(h) The Attorney General, upon request of a regional board or the state board, shall petition the superior court to impose, assess, and recover such sums. Except in the case of a violation of a cease and desist

order, a regional board or the state board shall make such request only after a hearing, with due notice of the hearing given to all affected persons. In determining such amount, the court shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and corrective action, if any, taken by the discharger.

(i) The provisions of Article 3 (commencing with Section 13330) and Article 6 (commencing with Section 13360) of this chapter shall apply to proceedings to impose, assess, and recover an amount pursuant to this article.

(j) Any person who pays any liability established under this section shall be entitled to contribution for such liability from any third party, in an action in the superior court and upon proof that the discharge was caused in whole or in part by an act or omission of the third party, to the extent that the discharge is caused by the act or omission of the third party, in accordance with the principles of comparative fault.

(k) Remedies under this section are in addition to, and do not supersede or limit, any and all other remedies, civil or criminal; provided that no liability shall be recoverable under subdivision (b) for any discharge for which liability is recovered under Section 13385.

(l) The state board shall submit an annual report to the Legislature which shall be available to the public, list all instances in which civil liability has been administratively imposed by a regional board in accordance with

subdivision (d), (e), or (f) during the preceding year, and set forth the express findings made by the regional board pursuant to subdivision (g), and indicate the maximum amount of liability which could have been imposed and the amount actually imposed in each instance.

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§ 13385. Violations; civil liabilities

(a) Any person who violates any of the following shall be liable civilly in accordance with subdivisions (b), (c), (d), (e), and (f):

(1) Section 13375 or 13376.

(2) Any waste discharge requirements or dredged and fill material permit.

(3) Any requirements established pursuant to Section 13383.

(4) Any order or prohibition issued pursuant to Section 13243 or Article I (commencing with Section 13300) of Chapter 5, if the activity subject to the order or prohibition is subject to regulation under this chapter.

(5) Any requirements of Section 301, 302, 306, 307, 308, 318, or 405 of the Federal Water Pollution Control Act, as amended.[1]

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[1] 33 U.S.C.A. §§ 1311, 1312, 1316, 1317, 1318, 1328, 1345

(6) Any requirement imposed in a pretreatment program approved pursuant to waste discharge requirements issued under Section 13377 or approved pursuant to a permit issued by the administrator.

(b) Civil liability may be imposed by the superior court in an amount not to exceed the sum of both of the following:

(1) Twenty-five thousand dollars ($25,000) for each day in which the violation occurs.

(2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed twenty-five dollars ($25) times the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

The Attorney General, upon request of a regional board or the state board, shall petition the superior court to impose the liability.

(c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

(1) Ten thousand dollars ($10,000) for each day in which the violation occurs.

(2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars ($10)

times the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

(d) For purposes of subdivisions (b) and (c), the term "discharge" includes any discharge to navigable waters of the United States, any introduction of pollutants into a publicly owned treatment works, or any use or disposal of sewage sludge.

(e) In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require.

(f) For purposes of this section, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(g) Remedies under this section are in addition to, and do not supersede or limit, any other remedies, civil or criminal except that no liability shall be recoverable under Section 13261, 13265, 13268, or 13350 for violations for which liability is recovered under this section.

(h) The Attorney General, upon request of a regional board or the state board, shall petition the appropriate court to collect any liability imposed pursuant to this section. Any person who fails to pay on a timely basis any liability imposed under this section shall

be required to pay in addition to that liability plus interest, attorneys' fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which the failure to pay persists. The nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of the person's liability and nonpayment penalties which are unpaid as of the beginning of the quarter.

(i) Funds collected pursuant to this section shall be paid to the State Water Pollution Cleanup and Abatement Account.

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§ 13396.5 Point and nonpoint dischargers; fees; deposits; misdemeanor; progress report; duration of section

(a) The state board shall establish fees applicable to all point and nonpoint dischargers who discharge into enclosed bays, estuaries, or any adjacent waters in the contiguous zone or the ocean as defined in Section 502 of the federal Clean Water Act (33 U.S.C. Sec. 1362), which shall be collected annually.

(b) The fees shall create incentives to reduce discharges to the ocean, bays, and estuaries and shall be based on the relative threat to water quality from point and nonpoint dischargers. The schedule of fees shall be set at an amount sufficient to fund the responsibilities and duties of the state board, the State Department of Health Services, and the Department of Fish and Game

established by this chapter. The total amount of fees collected pursuant to this section shall not exceed four million dollars ($4,000,000) per year. Nothing in this section limits or restricts the funding of activities required by this chapter from sources in addition to the fees established by this section.

(c) Fees collected pursuant to this section shall be deposited in the Bay Protection and Toxic Cleanup Fund which is hereby created, and shall be available for expenditure by the state board, upon appropriation by the Legislature, for the purposes of carrying out this chapter.

(d) Fees collected pursuant to this section shall be in addition to fees established pursuant to Section 13260 and shall not be subject to the maximum fee established in subdivision (d) of Section 13260, provided that the annual fee under this section shall not exceed the amount of thirty thousand dollars ($30,000) per discharger.

(e) Any person failing to pay a fee established under this section when so requested by the state board is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (d) of Section 13261.

(f) On or before January 1, 1993, the State Board shall report to the Legislature on the progress made toward meeting the requirements of this chapter and the adequacy of the fee levels established in subdivisions (b) and (d).

(g) This section shall remain in effect only until January 1, 1994, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1994, deletes or extends that date.

California Code of Regulations
State Water Resources Control Board
Title 23 § 2200

* * *

(d) The annual fee for persons whose discharges are regulated by a general NPDES permit or a general waste discharge requirements issued by the State Board or a Regional Board (excluding storm water permits) shall be based on the TTWQ and CPLX of the discharge. All discharges that are subject to a given permit shall pay the same fee.

(e) "Dredge and Fill Operations Fees" Fees for fill or dredge operations shall be assessed, as follows:

Fill:	One acre or less, flat fee of $1,000. More than one acre, $1,000 per acre or part thereof (not to exceed statutory maximum).
Dredge:	Less than 10,000 cubic yards, flat fee of $500. 10,000 to 20,000 cubic yards, flat fee of $2,000. More than 20,000 cubic yards, $2,000 plus $250 for each additional 5,000 cubic yards or part thereof (not exceed the statutory maximum).

(f) Dischargers who own or operate confined animal feedlots, including dairies, shall not be assessed an annual fee for waste discharge requirements regulating those operations. They shall pay a filing fee of $2,000 which shall be submitted with each report of waste discharge or NOI. If waste discharge requirements are waived pursuant to section 13269 of the Water Code, all

or a portion of the filing fee will be refunded in accordance with Section 2200.4.

NOTE: Authority cited: Sections 185 and 1058, Water Code Reference: Section 13260, Water Code.

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28 U.S.C. § 1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

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28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 U.S.C. § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 6226, 6228(a), 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

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28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable is sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where

removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

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28 U.S.C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, [26 USCS § 7428] a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 355 or 360b].

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33 U.S.C. § 1323. Federal facilities pollution control

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with 28 U.S.C. 1441 et seq. [28

USCS §§ 1441 et seq.] No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act [33 USCS § 1316 or 1317]. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned

or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

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33 U.S.C. § 1344

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(t) Navigable waters within State jurisdiction. Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

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33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this Act:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act [33 USCS § 1288].

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical

wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

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42 U.S.C. § 6961. Application of Federal, State, and local law to Federal facilities

(a) In general. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement

for permits or reporting or any provisions or injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal

Court with respect to the enforcement of any such injunctive relief. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local solid or hazardous waste law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

* * *

33 C.F.R. § 323.2 Definitiions.

* * *

(d)(1) Except as provided below in paragraph (d)(2), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidential fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

(ii) The runoff or overflow from a contained land or water disposal area; and

(iii) Any addition, including redeposit other than incidential fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land-clearing, ditching, channelization, or other excavation.

* * *

99-15279

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, Acting by and through the California State Water Resources Control Board,	)
Plaintiff-Appellant,	)
v.	)
UNITED STATES OF AMERICA; U.S. Department of Army, Corps of Engineers,	)
Defendants-Appellees.	)

On Appeal from the United States District Court
for the Northern District of California
No. C 98-0792 WHO
The Honorable William H. Orrick, Jr., Judge

REPLY BRIEF FOR APPELLANT
STATE OF CALIFORNIA

* * *

ARGUMENT

I.

THE IMMUNITY OF BAY PROTECTION AND TOXIC CLEANUP PROGRAM FEES IS NO LONGER AN ISSUE IN THIS APPEAL, SINCE THOSE FEES HAVE BEEN RENDERED UNENFORCEABLE UNDER STATE LAW.

At this time the State of California is withdrawing from this appeal the issue of whether the BPTCP fees are included in the Clean Water Act's waiver of sovereign immunity. We recently discovered a defect in state law which renders the issue moot.

The authority for assessing the BPTCP fees (former Water Code § 13396.5), was repealed by its own terms on January 1, 1998. Under California law, absent a savings clause, a statute which has been repealed provides no authority for collecting delinquent fees under these circumstances, where the fee claims have not been reduced to a final judgment in favor of the State, and the State is not seeking criminal penalties against the United States for its refusal to pay fees. California Government Code section 9606 provides:

> "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal."

In *California Employment Commission v. Arrow Mill Company* (1941) 45 Cal.App.2d 668 [114 P.2d 727] the Court held that "[t]he repeal, without a saving clause or provision, of a statute imposing a license tax or fee takes away the right to collect an unpaid tax [or fee] which is due

even though a suit to collect the tax is pending. By the repeal of statutes which authorize the making of assessments and the collection thereof, not only the remedy for the collection of an assessment but also the lien or right is taken away, although expenses have been incurred on the faith of such assessment. And nothing less than a plain exception of existing cases or claims from the operation of a repealing act or continuance of the same system . . . under new regulations would save such cases or claims from the effect of the repeal." *Id.* at 672.

Accordingly, the State is compelled to withdraw its claim for BPTCP fees since that claim no longer exists under state law. Notably, however, this withdrawal concerns only BPTCP fees, and not WDR fees. The WDR fees still present a ripe and compelling issue in this appeal, and we seek this Court's resolution of all of the issues of this case as they apply to WDR fees.[1]

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[1] The State Water Resources Control Board continues to seek legislation which would revive statutory authority for seeking BPTCP fees. Should that legislative effort be successful, the State reserves the right to bring a claim against the United States for any future nonpayment of such BPTCP fees. However, such a claim would be limited to fees for periods of time subsequent to the future legislation which may revive the authority for assessment of BPTCP fees. Compare Government Code § 9608, which provides that determination or suspension of any law creating a *criminal* offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law.

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BRIEF FOR APPELLANT STATE OF CALIFORNIA

* * *

in conjunction with applications for waste discharge requirements. Water Code section 13260. Complaint ¶ 4, ER 9.

Defendant U.S. Department of Army Corps of Engineers (hereinafter, "Corps of Engineers") is an agency of the United States government, with an office in San Francisco, California. The Corps of Engineers and its agents

and employees are charged with carrying out the requirements of federal law, including the Clean Water Act, 28 U.S.C. section 1251 *et seq.*, and with complying with applicable provisions of the California Water Code and the California Code of Regulations. Moreover, the Corps of Engineers has authority under the Clean Water Act to approve dredge and fill projects. 33 U.S.C. section 1344 (permits for dredged or fill material). In addition, the Corps of Engineers itself performs dredging projects in California and is therefore subject to the requirements of California law with respect to the control and abatement of water pollution, including the requirement to pay reasonable fees or service charges incident to its dredging operations. Complaint ¶ 6, ER 9.

B. Waste Discharge Reports, Requirements and Fees Pursuant to the Porter-Cologne Water Quality Control Act.

California Water Code section 13000 *et seq.* is known as the Porter-Cologne Water Quality Control Act. Water Code section 13020. Water Code section 13260 requires that any person discharging waste, or proposing to discharge waste, that could affect the quality of the waters of the State, other than into a community sewer system, shall file with the appropriate California regional water quality board a report of the discharge. *"Person" is defined to include the United States, to the extent authorized by federal law.* Water Code section 13050(c). Section 13260 further provides that each person for whom waste discharge requirements have been provided pursuant to section 13263 shall submit both an application fee and subsequent annual fee not to exceed $10,000 per year

according to a reasonable fee schedule established by the State Water Board (hereinafter referred to as "WDR fees"). The application fee serves as the first annual WDR fee.[2] Fees are to be calculated based on total flow, volume, number of animals or area involved – all factors indicative of the potential water quality impacts of the discharge and the extent of regulatory oversight required. Water Code Section 13260(d)(1). Punishment or redress for past violations is not one of the factors considered in calculating fees. *Ibid.* Pursuant to section 13260(d)(2), all such WDR fees collected are deposited in the Waste Discharge Permit Fund which is limited to expenditure by the State Water Board, upon appropriation by the Legislature, for the purposes of carrying out the Porter-Cologne Water Quality Control Act.[3] Therefore, revenues from WDR fees may be used for, *inter alia*, processing applications for WDRs, water quality investigations and inspection of facilities to ascertain compliance, and responding to incidences of spills or improper discharges from facilities. See Water Code sections 13168, 13263, 13267, and 13304. The State Water Board has established a reasonable

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[2] The district court erroneously believed that application and reporting fees are "separate and distinct" from the WDR fees in question. Opinion and Order at 8, ER 105. This may account for the district court's determination that the WDR fees' "primary function is to penalize, or at least render very costly, lawful dredging activities." *Id.* See Water Code section 13260(e).

[3] Again, the district court apparently has misconstrued the function of the WDR fees in citing the United States' contention that the WDR fees "are placed in a general fund and are not linked to water quality service or related to permitting requirements or other related activity." Opinion and Order at 17, ER 114.

fee schedule at Title 23, section 2200, of the California Code of Regulations, entitled "Waste Discharge Reports and Requirements." Complaint ¶ 9, ER 11.

The Corps of Engineers is currently, and has been in the past, involved in dredging and fill operations in the State of California. Corps of Engineers' dredging and fill operations necessarily involve the discharge of "waste" within the meaning of California Water Code section 13050(d). Accordingly, the Corps of Engineers' dredging and fill operations are subject to the requirements of section 13260, including the requirement to report waste discharges to the appropriate regional board, and the requirement to pay WDR fees established by the State Water Board. Complaint ¶ 10, ER 11.

C. Bay Protection and Toxic Cleanup Program and Fees.

In Chapter 5-6 of Article 7 of Division 7 of the California Water Code, the Legislature established the Bay Protection and Toxic Cleanup Program (hereinafter referred to as "BPTCP"). See Water Code sections 13390 *et seq.* The purpose of the BPTCP is for the State Board and regional boards to establish programs that, *inter alia*,

> [P]rovide maximum protection for existing and future beneficial uses of bay and estuarine waters, and that these *programs include a plan for remedial action at toxic hot spots.* It is also the intent of the Legislature that these programs *further compliance with federal law* pertaining to the identification of waters where the protection and propagation of shellfish, fish, and wildlife

> are threatened by toxic pollutants *and contribute to the development of effective*
>
> * * *
>
> *"[T]he fact that [persons paying the fee] may not believe they 'benefit' from the . . . fee does not transform a regulatory fee into a 'special tax.' It is well settled that a [governmental body] under the police power may impose a regulatory fee when . . . the fee constitutes an amount necessary the* [sic] *carry out the provisions of the regulation."* (*Id.* at 375 n.11 [228 Cal.Rptr. at 733 n.11, 721 P.2d at 1118 n.11].)

The permit-related water quality fees at issue here are classic regulatory fees, legitimately imposed on federal dischargers with the consent of Congress. Yet that was not an issue that should have been decided on a motion to dismiss. Indeed, as stated in *City of Columbia*, the court must go "beyond the bare face of the [allegedly] taxing statute to consider all relevant circumstances" in determining whether a particular tax is levied on the federal government or a related private party. *U.S.* v. *City of Columbia, Mo., supra*, 914 F.2d at 155, citing *United States* v. *City of Detroit*, 355 U.S. 466, 469 (1958). All relevant facts and circumstances should have been considered by the district court at trial or on motion(s) for summary judgment after appropriate discovery.

V.

THE FEDERAL DEFENDANTS WERE NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW THAT THE STATE FEES ARE NOT SERVICE CHARGES

In the case of *State of Maine v. Dept. of Navy, 973 F.2d 1007* (1st Cir. 1992), the court interpreted the phrase "reasonable service charges" appearing in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. section 6961. The First Circuit, in an opinion written by Chief Judge Steven Breyer, upheld the District Court's denial of the Navy's summary judgment motion. *Id.* at 1011.

The Navy had argued that it was immune from a Maine statute imposing a $500 licensing fee and a 2 cents per pound generating fee for solid waste because the federal government had waived its immunity only with respect to reasonable fees, and the Navy considered the fees at issue there to be unreasonably high. The court concluded that the Navy was not entitled as a matter of law to summary judgment on its claim that Maine's fees were unreasonably high, and the district court's denial of the Navy's motion for summary judgment on this issue was legally correct. *Id.* at 1014.

In reaching this judgment, the First Circuit noted that Maine's fees at issue there were not designed simply to raise money for general revenue purposes, but were like "classic regulatory fees" imposed by an agency upon those subject to its regulation and used to raise money to help defray the agency's regulation-related expenses. *State of Maine v. Department of Navy, supra,* 973 F.2d at 1012. Money assessed by Maine was used by the State to

pay salaries and other costs of personnel and equipment used to supervise and enforce state hazardous wastes laws, including costs of site inspections and clean up of hazardous waste spills. *Id.* at 1013.[13] *In that case, discovery documents suggested that there was a rough relationship between state regulatory fees charged and state regulatory costs related to the Navy shipyard located in Maine.* This was sufficient to show that a state regulatory charge is a reasonable and permissible fee, and not an impermissible "tax" on a federal installation. *Id.* at 1013, quoting *Massachusetts v. United States*, 435 U.S. at 468-69 (1978).

The *State of Maine* court noted that part of the fees collected went to pay for a spill response team. The Navy had complained that the response team provided a general benefit to the public, and not to the Navy. The Court conceded that the presence of the State response team does benefit the general public as do most regulatory expenditures,

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[13] The *State of Maine* court "borrowed" the test set out in *Massachusetts v. United States, supra*, 435 U.S. at 468-69 in order to reach its conclusion on the reasonableness of Maine's fees. In this case, as we argued above, the most appropriate federal test is to "consider all the facts and circumstances of the record . . . to determine the essential nature of the [assessment]" including reference to well-established state law on the tax versus fee issue. See *U.S. v. City of Columbia, Mo*, 914 F.2d 151 (8th Cir. 1990). Note that the case of *Atchison, Topeka and Santa Fe Railway Company v. Brown & Bryant, Inc.*, 132 F.3d 1295, 1301 (9th Cir. 1997) (state law, not federal common law, dictates the parameters of successor liability under CERCLA), which was decided since *State of Maine*, may compel the application of state law on the tax versus fee issue here. However, the state fees at issue satisfy the *Massachusetts v. United States* test as well.

> "but the presence of a state spill response team does more than provide a general benefit. It also benefits the regulated entity in a special way. It helps to *ensure their compliance* with state goals and standards for prompt clean ups. In our view, a state spill response team (perhaps like airplane safety inspectors, or crash investigators, or special airport rescue teams) bears a close enough relation to the regulatory process as to permit a state's assessing regulated entities that may cause spills a special charge for its support." (Emphasis added.) (*State of Maine v. Department of Navy, supra,* 973 F.2d at 1013, citing *Massachusetts v. United States,* 435 U.S. at 468.)

The *State of Maine* court analogized to other legitimate regulatory fees which help ensure compliance of regulated entities, such as a fee supporting cost of environmental reviews, uncontested hearings, and administrative and technical support for licensing procedures. *Id.* at 1013-1014) [citations omitted].

The court specifically rejected the Navy's argument that since the State response team had never responded to a spill at the Navy shipyard, the Navy had received no benefit from the presence of the team and that the regulatory fees were therefore not based on a "fair approximation of its use of the system." *Id.* at 1014. The court emphasized that the State's spill response capability was "available to minimize any future spill at the shipyard.' *Ibid.* The Navy therefore benefitted from the team's availability, even though, in fact, it had never used the team. *Ibid.* Moreover, the law does not require a precise correlation between regulatory fees collected and regulatory

services provided to each regulated firm. *Id.*, citing *Massachusetts v. United States, supra,* 435 U.S. at 468. The court emphasized the significance of the availability of benefits or services to regulated entities, including the federal government, not whether any particular federal facility had received specific services in the past funded by a particular fee. *Id.*[14]

In *State of Maine* the federal government was challenging the reasonableness of service charges. Here the federal government was not challenging, for the purposes of its motion, whether the charges are reasonable but whether they are service charges. Still, *State of Maine* compels the conclusion that the instant motion to dismiss

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[14] Another relevant case is *New York State Department of Environmental Conservation v. United States Department of Energy,* 850 F. Supp. 132 (N.D.N.Y. 1994). There, after considerable discovery had taken place, the court held (on cross motions for summary judgment) that New York had met the "fair approximation" second prong of the *Massachusetts* test. The United States was ordered to pay past due regulatory fees totaling approximately $1 million (as well as accrued interest). The amount of the charges varied in relation to the particular size of the facility's operation (e.g., gallons, pounds, vehicles) rather than upon the particular services rendered to such facilities by New York. *Id.* at 134. The Court held that the second prong of the *Massachusetts* test does not require an exact correlation, in terms of dollars and cents, between the costs of the overall services provided and the fees assessed for such services. "Rather, it requires only a rational relationship between the method used to calculate the fees and the benefits available to those who pay them." *Id.* at 142-143. Here, because the trial court dismissed this action on a motion to dismiss, the State of California never had the opportunity to demonstrate that a rational relationship exists between the fees and the benefits available to those who pay them.

should have been denied because the federal government is not entitled as a matter of law to judgment on its claim that the State's fees are not service charges.

As with the Maine statute, the California statutory scheme provides benefits or services to the Corps as a regulated entity. Moreover, the State here could have shown actual benefits to the Corps and services provided. For example, at trial the State would have shown that fees were expended for such activities as administrative and environmental review, monitoring, record-keeping, and investigations of the water quality impact of Corps dredging. Such activities are aimed at ensuring compliance with the law. California statutes with respect to the two fees at issue here provide for services and benefits to the Corps of Engineers as a regulated entity which are comparable to benefits analyzed in the *State of Maine* case. *Indeed, the California Water Code is replete with provisions and requirements that provide benefits and services to the Corps above and beyond what the general public receives.*

The basic structure of the waste discharge reports, requirements and fees program pursuant to the Porter-Cologne Water Quality Control Act, California Water Code section 13000, et seq., is set out above at pp. 8-11. The basic structure of the Bay Protection and Toxic Clean Up Program ("BPTCP") and attendant fees are set out above at pp. 11-13. Moreover, "water quality control" is broadly defined in Water Code section 13050(i). And as noted above, waste discharge requirement fees ("WDR fees") collected are deposited in the Waste Discharge Permit Fund, which is available for expenditure by the State Water Board, upon appropriation by the Legislature, for *inter alia*, programs to control the quality of all the

waters of the State, and to protect water quality from degradation. See Water Code section 13000. Such revenues in the fund may be used for, *inter alia*, water quality investigation and inspection of facilities to ascertain compliance. See Water Code sections 13168 and 13267. And Water code section 13168 provides that the State board shall allocate to the regional boards from funds appropriated to the State board such part thereof as may be necessary for the administrative expenses of such boards.

In addition, a regional board in establishing or reviewing any waste discharge requirements may investigate the quality of any waters of the State within its region; such investigations may include requiring the discharger to provide technical monitoring program reports. The investigations by the regional boards may also include inspection of facilities in order to ascertain compliance with waste discharge requirements. Water Code section 13267(c). Moreover, the State board or a regional board may establish monitoring, inspection, entry, reporting, and record-keeping requirements for any discharger and may inspect the facilities of any discharger. Water Code section 13383. WDRs may be adopted only after notice and any necessary hearing. Water Code section 13378 and see Water Code section 13263. As well, a regional board may review and revise waste discharge requirements upon application by any affected person or on its own motion. Water Code section 13263(e) and see Water Code section 13380.

The Bay Protection and Toxic Cleanup Program contains similar provisions. Specific provisions relating to Bay Protection and Toxic Cleanup Program and fees are contained in Chapter 5.6 of Article 7 of Division 7 of the

California Water Code section 13390, *et seq.*, which is contained in Division 7 (Water Quality) of the California Water Code. Accordingly, the provisions of Water Code section 13267, providing for water quality investigation, reports, technical or monitoring program reports, and facility inspections are fully applicable to the BPTCP since Water Code section 13267 by its own terms is applicable to "any plan or requirement . . . authorized by [division 7]." Water Code section 13267(a).

Moreover, an important legislative intent of the program is to further compliance with federal law. See Water Code section 13390. And the BPTCP requires the development of a consolidated data base identifying toxic hot spots, the establishment of a state monitoring and surveillance task force, and the assessment and priority ranking of toxic hot spots. Water Code sections 13392.5, 13393.5. Where appropriate, waste discharge requirements may be reevaluated based on the priority ranking; such revisions of WDRs ensure compliance with water quality control plans. Water Code section 13395. Fees collected under BPTCP went to these purposes. Water Code section 13396.5(b)(c).

The California Water Code thus sets up programs wherein fees collected are used for regulatory activities which, *inter alia*, help ensure the Corps' compliance with law (e.g., administrative review of permit applications, investigations of discharges) and/or make due process services available to the Corps (e.g., available hearings, review and re-evaluation of WDRs). Plainly, considerable services and benefits are available to the class of regulated dischargers, including the Corps, above and beyond

the benefit to the general public provided by regulatory fees at issue.

The trial court ruled that these services and benefits are irrelevant since in *Maine* the U.S. was challenging the "reasonableness" of the service charges, and here it concedes "reasonableness" while claiming the "service" charges are disguised "penalties". ER 118-119. But the *Maine* discussion is highly relevant to the issue of whether California's fees are in fact "service" charges. The First Circuit draws no bright line between "reasonable" and "service". Its detailed well-reasoned fee analysis offers lucid practical guidance on the definition of "reasonable service charges", and on the proportionality factors contained in the *Massachusetts test*. *Id.* at pp. 1011-1014. And its discussion of penalties simply corroborates the State's position here: California does not seek penalties or punitive fines, it seeks only the payment of delinquent service charges. *Id.* at 1010-1011, 1014-15.

CONCLUSION

The Supreme Court has stated that "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced". *United States* v. *Aetna Casualty and Surety Co.*, 338 U.S. 366, 383 (1949) (quoting Judge Cardozo in *Anderson* v. *John L. Hayes Const. Co.*, 153 N.E. 28, 29-30 (N.Y. 1926). Congress has also issued a plea to the Courts to avoid resorting to "ingenuity to create ambiguity." 138 Cong. Rec. #9135, 9136 (daily ed. Sept. 23, 1992). In this case, the clear and unambiguous waivers of

sovereign immunity contained in the relevant Clean Water Act provisions bar the trial court's conclusion that, as a matter of law, the State of California may not assess the same reasonable service charges upon federal dischargers that it assesses on

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
WILLIAM H ORRICK, JUDGE

STATE OF CALIFORNIA,	)	
PLAINTIFF,	)	
VS.	)	NO. C 98-0792 WHO
UNITED STATES OF AMERICA,	)	
DEFENDANT.	)	

SAN FRANCISCO, CALIFORNIA
THURSDAY, AUGUST 27, 1998

APPEARANCES:

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BY: SYLVIA QUAST, TRIAL ATTORNEY

REPORTED BY: DIANE E. SKILLMAN,
OFFICIAL COURT REPORTER

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

THURSDAY, AUGUST 27, 1998 2:00 P.M.

[2] THE CLERK: CALLING CIVIL 98-0792 STATE OF CALIFORNIA VERSUS UNITED STATES OF AMERICA.

COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCE FOR THE RECORD.

MS. QUAST: GOOD AFTERNOON, YOUR HONOR, SYLVIA QUAST FOR THE DEFENDANT U.S. ARMY CORPS OF ENGINEERS.

THE COURT: DID YOU HAVE A GOOD CHANCE TO STUDY?

MS. QUAST: I CERTAINLY DID, YOUR HONOR. I'M GOING TO BE FOCUSING ON THE SOVEREIGN IMMUNITY ISSUE, IF THAT I$ OF INTEREST TO THE COURT.

THE COURT: ALL RIGHT. IT IS YOUR MOTION, YOU MAY PROCEED.

MR. NEVILLE: YOUR HONOR, SHOULD I STATE – MICHAEL NEVILLE FOR THE STATE OF CALIFORNIA.

MS. QUAST: AS I SAID, YOUR HONOR, I AM GOING TO BE FOCUSING ON THE SOVEREIGN IMMUNITY ISSUE HERE IN PART BECAUSE THE CONSTITUTIONAL ISSUE THAT'S RAISED IS TO SOME EXTENT SUBSUMED IN THE SAME SORTS OF CONSIDERATIONS AS THE SOVEREIGN IMMUNITY ARGUMENT.

THERE IS ONE GUIDING PRINCIPLE THAT THE COURT NEEDS TO REMEMBER WITH REGARD TO THE WAIVER OF SOVEREIGN IMMUNITY, AND THAT IS THAT WAIVER OF SOVEREIGN IMMUNITY ARE TO BE [3] CONSTRUED VERY STRICTLY.

IF NOTHING ELSE, THIS IS THE TEACHING OF THE SUPREME COURT CASES CITED IN OUR BRIEF. IN FACT, THERE ARE TWO SUPREME COURT CASES ON A CLEAN WATER ACT SOVEREIGN IMMUNITY WAIVER. WHAT WE SEE IN THOSE SUPREME COURT CASES IS THE SUPREME COURT SAYING TO THE LOWER COURTS, NO, YOU MIGHT WANT TO IMPLY SOMETHING, YOU MIGHT WANT TO LOOK AT THE LEGISLATIVE HISTORY, YOU MUST NOT DO THAT. YOU MUST READ THESE WAIVERS VERY STRICTLY.

IF THE LANGUAGE IS NOT RIGHT THERE IN THE TEXT, IF THE WAIVER IS NOT EXPLICIT, YOU CAN'T READ IT IN, YOU CAN'T LOOK AT LEGISLATIVE HISTORY, YOU CAN'T BROADEN IT IN ANY WAY, YOU MUST LOOK AT THIS VERY NARROWLY.

THE COURT: YOU ARE TALKING ABOUT DOE AGAINST – *DEPARTMENT OF ENERGY AGAINST STATE OF OHIO.*

MS. QUAST: THAT'S THE SECOND CLEAN WATER ACT CASE. THE FIRST CLEAN WATER ACT CASE WOULD BE THE *STATE OF CALIFORNIA VERSUS EPA*, WHICH IS THE 1976 CASE ALSO ON SECTION 313.

THE COURT: CALIFORNIA AGAINST WHOM?

MS. QUAST: *CALIFORNIA VERSUS THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.*

THE COURT: WHAT YEAR WAS THAT?

MS. QUAST: 1976, YOUR HONOR.

THE COURT: NOW IN THE *OHIO* CASE –

MS. QUAST: YES, YOUR HONOR.

[4] THE COURT: – WHAT IMPACT DOES THAT HAVE ON A CASE OF *UNITED STATES AGAINST MASSACHUSETTS*?

MS. QUAST: THE *UNITED STATES VERSUS MASSACHUSETTS* CASE IS THE CASE ABOUT HOW ONE SHOULD DETERMINE WHETHER YOU ARE TALKING ABOUT A FEE OR A TAX?

THE COURT: YES.

MS. QUAST: I THINK THAT THEY ARE ONLY INDIRECTLY RELATED.

WHAT I WOULD SAY ABOUT THE *DEPARTMENT OF ENERGY* CASE, THE 1992 CASE, THE SUPREME COURT IS SAYING THERE THAT WHEN YOU ARE LOOKING AT WAIVERS OF SOVEREIGN IMMUNITY, FOR EXAMPLE, THE 313, SECTION 313 WAIVER, YOU MUST LOOK AT IT NARROWLY.

WHEN YOU SEE THE WORD "REQUIREMENTS" IN THERE, THAT IS NOT GIVING YOU LEAVE TO READ JUST ANYTHING INTO IT.

I THINK WHAT THE *MASSACHUSETTS* CASE IS GETTING AT IS IF YOU ARE TALKING ABOUT – I'LL STEP BACK FOR A MOMENT.

THE *MASSACHUSETTS* CASE AND THE OTHER SET OF LINE OF CASES THAT WE BOTH CITED IN OUR BRIEFS FOR GETTING AT THE ISSUE OF SERVICE CHARGES, THIS IS IN SECTION 313, WHAT THE COURTS ARE TRYING TO DO IS TO FIGURE OUT WHAT THE TERM "SERVICE CHARGES" MEAN.

SOME COURTS LOOK TO THE *MASSACHUSETTS* LINE OF CASE AND SOME COURTS HAVE LOOKED TO THE OTHER LINE OF CASES, THE *CITY OF HUNTINGTON, CITY OF COLUMBIA* LINE OF CASES.

[5] THE *MASSACHUSETTS* CASE AT SOME LEVEL IS AN EASIER TEST, IT'S MORE CLEAR-CUT, IT IS ONE, TWO, THREE.

IN THE *CITY OF HUNTINGTON* AND *CITY OF COLOMBIA* ARE SOMEWHAT MORE FLUID, SHALL WE SAY, BUT I THINK THEY'RE THE CORRECT TEST. THEY ARE TALKING ABOUT SITUATIONS WHERE STATES ARE SEEKING TO COLLECT FEES, MONIES OF SOME SORT FROM THE FEDERAL GOVERNMENT.

SO WHEN YOU ARE LOOKING AT AN ISSUE LIKE WHAT WE HAVE HERE, WHEN YOU HAVE A STATE TRYING TO COLLECT MONEY FROM THE FEDERAL GOVERNMENT, THE CORRECT STATE REALLY IS THE *CITY OF HUNTINGTON* OR *CITY OF COLOMBIA*, THE MORE FLUID LOOKING AT THE OVERALL CIRCUMSTANCES.

THE COURT: WHEN YOU LOOK AT A CASE LIKE THIS, IS IT HELPFUL TO PUT IT IN THE FRAMEWORK OF *UNITED STATES AGAINST MASSACHUSETTS*, AS YOU REFERRED TO IT, THE ONE, TWO, THREE?

MS. QUAST: RIGHT. THE MUCH MORE STRAIGHTFORWARD YOU LAY OUT RATHER THAN HAVING A WHOLE ARRAY OF THINGS.

THE COURT: YES. SHOULDN'T THAT BE THE TEST OR NOT?

MS. QUAST: I DON'T THINK SO, YOUR HONOR. I REALLY DO THINK THAT BECAUSE WHAT YOU ARE REALLY TALKING ABOUT, IT GOES BACK TO THE CONSTITUTIONAL ISSUE OF WHICH DIRECTION THE FEES ARE BEING IMPOSED.

THE *MASSACHUSETTS* TEST IS REALLY IN THE CIRCUMSTANCE WHERE YOU'VE GOT THE FEDERAL GOVERNMENT TAXING THE STATES, AND THE KIND OF IMMUNITY THAT THE STATES GET IS MUCH MORE LIMITED [6] THAN WHAT THE FEDERAL GOVERNMENT GETS VIS-A-VIS THE STATE.

THIS ALL GOES BACK TO THE SUPREMACY CLAUSE. EVEN THOUGH I INTENDED TO TALK ABOUT SOVEREIGN IMMUNITY, WE ARE GETTING INTO THE TAX ISSUE ANYWAY, AS YOU CAN SEE.

I WOULD SAY THAT –

THE COURT: THESE ARE QUESTIONS THAT OBVIOUSLY COME UP, BECAUSE IF YOU GRANT THAT SOVEREIGN IMMUNITY IS WAIVED, THEN THE

QUESTION IS WHAT KIND OF A TEST DO YOU PROPOSE THAT THE COURT USE TO DETERMINE WHETHER THE FEE IS A SERVICE CHARGE AND NOT A TAX.

MS. QUAST: I THINK THE TEST THAT WE WOULD PROPOSE IS THE ONE THAT YOU SEE IN THE *CITY OF COLOMBIA* CASE. THERE IS ACTUALLY SOME ANALOGIES BETWEEN THE *CITY OF COLOMBIA* CASE AND THE *MASSACHUSETTS* CASE.

THE SECOND PRONG OF *MASSACHUSETTS* SAYS: "IS THE ASSESSMENT IN QUESTION BASED UPON A FAIR APPROXIMATION OF USE OF THE SYSTEM?" AND YOU SEE THOSE KINDS OF CONCERNS IN *CITY OF COLOMBIA* AS WELL. WHAT EXACTLY ARE YOU GETTING FOR WHAT YOU ARE PAYING?

ON THE THIRD ISSUE IN *MASSACHUSETTS*, THE THIRD PRONG OF THE TEST IS: IS IT STRUCTURED TO PRODUCE VENUES THAT WON'T EXCEED TOTAL COST TO GOVERNMENT?

AND THAT GETS TO THIS ISSUE, I THINK, OF AGAIN WHAT ARE YOU GETTING FOR WHAT YOU ARE PAYING? ARE YOU GETTING SOMETHING THAT EVERYBODY IS GETTING, FIRE PROTECTION, SOME SORT [7] OF LARGER PROTECTION LIKE THAT, PUBLIC HEALTH CONCERNS, CLEAN WATER, OR ARE YOU GETTING SOMETHING MUCH MORE SPECIFIC, FOR EXAMPLE, WHAT THE SUPREME COURT TALKS ABOUT IN THE *STATE OF CALIFORNIA* CASE LIKE, TREATMENT OF YOUR SEWAGE, OR ELECTRICITY, OR WATER.

THE COURT: THAT'S A DIFFERENT TEST FROM YOUR FIRST POSITION, STRONG POSITION, SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED. AND THAT'S THE END OF IT UNDER SOMETHING CALLED THE SUPREMACY CLAUSE.

BUT THEN YOU GET INTO THESE REASONABLE FEES. SUPPOSE THE CORPS OF ENGINEERS IS GOING TO DREDGE SAN FRANCISCO BAY, OR SOME LAGOON NEARBY, OR SO ON, THEN THE STATE OF CALIFORNIA CLAIMS SOME KIND OF A FEE.

MS. QUAST: WHICH IS EXACTLY WHAT IS HAPPENING HERE.

THE COURT: WELL, WHAT DOES THE UNITED STATES GET OUT OF THAT?

MS. QUAST: WELL, THAT IS EXACTLY OUR QUESTION, YOUR HONOR.

I MEAN, FROM OUR PERSPECTIVE WE ARE PROVIDING A SERVICE TO THE STATE OF CALIFORNIA BY DREDGING, BY KEEPING THE BAY CLEAR, FOR PUBLIC RECREATION, AS WELL AS FOR COMMERCIAL AND ECONOMIC NEEDS FOR THE STATE. WE SEE OURSELVES AS PROVIDING A SERVICE, AND WHAT WE ARE GETTING IN RETURN, THAT'S EXACTLY OUR POINT, YOUR HONOR.

THERE MAY BE SOME SORT OF LARGER PUBLIC BENEFIT BY [8] FUNDING THESE WATER QUALITY PROGRAMS, BUT THAT'S WHERE THESE FEES ARE GOING. THEY'RE NOT GOING SPECIFICALLY FOR, FOR EXAMPLE, PROCESSING A PERMIT OR SOMETHING LIKE THAT, IT IS INTO THIS LARGER POOL OF

REVENUE, LARGER KIND OF A WIDER DISTRIBUTION OF THE MONIES IN QUESTION. NO SPECIFIC SERVICE LIKE SEWAGE TREATMENT, ELECTRICITY, I MEAN MUCH MORE TANGIBLE THINGS LIKE THAT. WATER.

WHEN YOU LOOK AT, FOR EXAMPLE, THE *CITY OF COLOMBIA* CASE, YOU ARE TALKING ABOUT PROVISION OF ELECTRICITY AND WATER. THOSE ARE VERY TANGIBLE SERVICES.

THE COURT: WHAT UNDISPUTED FACTS ARE THERE IN THIS CASE TO SHOW THAT THE FEE AT ISSUE IS NOT A SERVICE CHARGE?

MS. QUAST: I THINK WHEN YOU LOOK AT THE PROVISIONS IN THE STATE LAW THEMSELVES DESCRIBING THE NATURE OF THESE FEES, YOU CAN SEE THERE IS ACTUAL LANGUAGE, FOR EXAMPLE, IN THE CASE OF I'LL USE THE ABBREVIATION, THE BTCPT FEES. THERE IS LANGUAGE RIGHT IN THE STATUTE ITSELF THAT SAYS THIS IS TO PROVIDE AN INCENTIVE FOR PEOPLE NOT TO DISCHARGE. THAT'S WHAT TAXES ARE ALL ABOUT, IS PROVIDING INCENTIVES FOR PEOPLE TO BEHAVE IN CERTAIN SORTS OF WAYS.

THIS ISN'T A MATTER OF UNDISPUTED FACTS BECAUSE THIS IS A MOTION TO DISMISS, BUT YOU CAN LOOK AT THE LAWS OF THE STATE OF CALIFORNIA ITSELF AND ITS OWN REGULATIONS ON WHAT THE POINT OF THESE ASSESSMENTS ARE AND THE SORTS OF STEPS TAKEN TO IMPLEMENT THEM. THEY ARE NOT –

[9] THE COURT: WHAT IS IT, YOUR POINT ABOUT THE INCENTIVES, THAT'S SECTION 133965.

MS. QUAST: EXACTLY, YOUR HONOR.

THE COURT: SUBSECTION B. AND IT SAYS: THE FEES SHALL CREATE INCENTIVES TO REDUCE DISCHARGES TO THE OCEAN.

MS. QUAST: THAT'S CORRECT, YOUR HONOR.

I MEAN, THE POINT THERE IS THAT'S CLASSIC USE OF TAXES, TO CREATE INCENTIVES FOR PEOPLE TO ENGAGE IN CERTAIN KINDS OF BEHAVIOR OVER-ARCHING KINDS OF BEHAVIOR. THAT DOESN'T TALK ABOUT WE WILL GIVE YOU A PERMIT, WE'LL DETERMINE THE CONDITIONS IN EXCHANGE FOR GETTING A ONE-TIME FEE. THIS IS AN ANNUAL FEE. THERE IS NO PERMIT HERE UNDER THIS PARTICU-LAR CATEGORY THAT YOU GET. THIS IS ABOUT INCENTIVES, GETTING PEOPLE TO DO THINGS.

AND THERE ARE PENALTIES IF YOU FAIL TO DO IT. UNLIKE THE SERVICE CHARGE, IF YOU DON'T PAY THE SERVICE CHARGE, YOU DON'T GET THE SERVICE. THAT IS NOT WHAT THEY ARE TALKING ABOUT HERE.

THE COURT: WHAT IS THE SPECIFIC WAIVER THAT'S CLAIMED BY THE STATE IF YOU CLAIM IT IS NOT A WAIVER?

MS. QUAST: THERE ARE –

THE COURT: IS THAT IN 1344?

MS. QUAST: THERE ARE TWO SECTIONS THAT WE BOTH TALKED ABOUT HERE, YOUR HONOR.

THE COURT: YEAH.

[10] MS. QUAST: I THINK THAT THE SECTION THAT THE COURT NEEDS TO FOCUS ON IS IN 1344(T) BECAUSE THAT SECTION OF THE CLEAN WATER ACT SPECIFICALLY TALKS ABOUT DREDGING ACTIVITIES OF FEDERAL AGENCIES. I CAN'T IMAGINE ANYTHING BEING MORE ON POINT HERE IN TERMS OF A WAIVER OF SOVEREIGN IMMUNITY. IT IS VERY SPECIFIC TO EXACTLY THE ACTIVITIES WE ARE TALKING ABOUT HERE.

AND WHEN YOU LOOK AT THAT WAIVER, IT'S NOT A COMPLETE WAIVER. THERE IS NO MENTION HERE OF MONETARY RELIEF OF ANY KIND. NO MENTION OF FEES, NO MENTION OF TAXES, NO MENTION OF SERVICE CHARGES, WHICH I THINK IS VERY SIGNIFICANT FOR A REASON I WILL EXPLAIN IN A MOMENT.

THE COURT: NOW WHAT IT SAYS IS: "THAT EACH SUCH AGENCIES, HAVING DESCRIBED THEM, SHALL COMPLY WITH SUCH STATE OR INTERSTATE REQUIREMENTS, BOTH SUBSTANTIVE AND PROCEDURAL, TO CONTROL THE DISCHARGE OF DREDGE OR FILL MATERIAL TO THE SAME EXTENT THAT ANY PERSON IS SUBJECT TO SUCH REQUIREMENTS."

MS. QUAST: THAT'S CORRECT, YOUR HONOR.

THE COURT: WHY ISN'T THAT A WAIVER?

MS. QUAST: BECAUSE THERE IS NO MENTION IN THERE OF ANY KIND OF MONETARY RELIEF OF ANY KIND. AND THAT'S ONE OF THE THINGS THAT YOU SEE AGAIN IN THE SUPREME COURT CASES, THAT THERE MUST BE A SPECIFIC, EXPLICIT REFERENCE TO WAIVERS FOR MONETARY PAYMENTS.

YOU MAY GET A WAIVER FOR ONE KIND OF RELIEF, BUT THERE IS NO MENTION OF ANYTHING MONETARY. YOU CAN'T INFER OR [11] SOMEHOW IMPORT INTO THE STATUTE MONETARY RELIEF AS WELL. THERE IS NO MENTION HERE.

AND THE THING I THINK IS VERY SIGNIFICANT HERE IN THIS POINT, IS COMPARE THAT TO SECTION 313(A), THIS BROADER WAIVER THAT YOU SEE IN THE CLEAN WATER ACT, THERE ARE SIMILAR SORTS OF LANGUAGE ABOUT. THE REQUIREMENTS THERE. IT GOES ON – I DON'T KNOW IF YOUR HONOR HAS IT RIGHT THERE BEFORE YOU.

THE COURT: I DO.

MS. QUAST: THERE IS THE SAME SORT OF LANGUAGE ABOUT COMPLYING WITH ALL FEDERAL, STATE, INTERSTATE AND LOCAL REQUIREMENTS. ADMINISTRATIVE AUTHORITY, PROCESS AND SANCTIONS RESPECTING THE CONTROL AND ABATEMENT OF WATER POLLUTION IN THE SAME MANNER – THIS SHOULD SOUND VERY FAMILIAR, IT'S JUST LIKE 404(T) – IN THE SAME MANNER AND

TO THE SAME EXTENT AS ANY NONGOVERNMENTAL ENTITY, INCLUDING THE PAYMENT OF ANY REASONABLE SERVICE CHARGES.

THAT'S NOT IN SECTION 1344(T). THERE IS NO MENTION OF SERVICE CHARGES WHATSOEVER. AND THIS PROVISION HERE, 313 – EXCUSE ME, SECTION 1323 WAS AMENDED AT THE SAME TIME AS SECTION 1344(T) WAS ADDED TO THE STATUTE.

IF CONGRESS HAD MEANT FOR THE CORPS OR FOR ANY OTHER FEDERAL AGENCY THAT DOES DREDGING TO BE PAYING SERVICE CHARGES, IT COULD HAVE PUT IT IN 1344(T). IT HAD A MODEL RIGHT HERE. IT DIDN'T INCLUDE THAT. THERE IS NO MENTION OF MONETARY PAYMENTS OF ANY KIND.

[12] THERE WAS – IF I CAN ADD ONE LAST POINT ON THAT, YOUR HONOR. THIS GOES BACK TO –

THE COURT: LET ME ASK ONE QUESTION.

MS. QUAST: CERTAINLY.

THE COURT: WITH RESPECT TO 1323, THERE IS REFERENCE TO THE PAYMENT OF REASONABLE SERVICE CHARGES. LAST TIME COUNSEL FOR THE STATE OF CALIFORNIA WAS WANTING TO READ THE *MAINE* CASE, JUSTICE BREYER, NOW JUSTICE BREYER'S OPINION, AND DO YOU, WHAT EFFECT DOES THAT HAVE ON YOUR ARGUMENT?

MS. QUAST: I THINK THE *STATE OF MAINE* CASE WAS FOCUSED ON THE WORD "REASONABLE" HERE RATHER THAN SERVICE CHARGES, AND THE

VARIOUS FACTORS THAT WENT INTO WHETHER THE CHARGES WERE REASONABLE.

IN THAT SITUATION, I THINK THERE WAS SOMETHING LIKE 500 – A $500 PAYMENT. I AM TRYING TO REMEMBER EXACTLY. IT WAS FOR HAZARDOUS WASTE DISPOSAL. IT WAS $500 PAYMENT AND THEN $2 PER TON PERHAPS, SOMETHING ON THAT ORDER. HERE WE ARE TALKING OVER HALF A MILLION DOLLARS IN FEES. SOMETIMES THE TWO DIFFERENT SETS OF FEES BEING APPLIED TO THE SAME KIND OF ACTIVITY.

WE ARE NOT DISPUTING – FOR PURPOSES OF THIS MOTION, WE ARE NOT DISPUTING THE REASONABLENESS ISSUE. SO I THINK THAT *STATE OF MAINE* IS REALLY FOCUSING ON THE REASONABLENESS ISSUE.

THERE IS ONE THING I WOULD ADD WITH REGARD TO *STATE OF MAINE* –

[13] THE COURT: DOESN'T THAT HELP YOUR POSITION?

MS. QUAST: I THINK IT DOES, YOUR HONOR. I THINK IT DOES. BECAUSE WE JUST HAVEN'T GOTTEN TO THAT POINT YET. I DON'T THINK WE NEED TO GET TO THAT POINT BECAUSE OF WHAT WE SEE IN THE STATE'S COMPLAINT AND THE STATE'S OWN LAWS DESCRIBING THESE ASSESSMENTS HERE. YOU DON'T NEED TO GO THAT FAR.

I ALSO THING [sic] THAT IT'S VERY IMPORTANT TO BE FOCUSING ON THE FACT THAT THE SPECIFIC

WAIVER FOR DREDGING BY FEDERAL AGENCIES NEVER MENTIONS ANYTHING ABOUT SERVICE CHARGES, WHEN JUST A FEW PAGES BEFORE IT, THERE IS A SOVEREIGN IMMUNITY WAIVER THAT DOES MENTION IT. AND I THINK IN THIS SITUATION, THE SPECIFIC WAIVER SHOULD APPLY TO THE SPECIFIC ACTIVITY. THAT IS NORMALLY THE WAY IT WORKS.

THE COURT: ALL RIGHT. NOW DID YOU HAVE SOMETHING ELSE?

MS. QUAST: LET ME SEE IF THERE WAS ANYTHING I WANTED TO – NO, I THINK THAT'S IT, UNLESS YOU HAVE ANY OTHER QUESTIONS.

THE COURT: ALL RIGHT.

MR. NEVILLE?

MR. NEVILLE, WHAT IS THE *OHIO* CASE, HOW DOES THAT IMPACT YOUR CASE? WHAT RELEVANCE DOES IT HAVE IN THE FIRST PLACE?

MR. NEVILLE: I THINK IT [sic] PROBABLY ONLY RELEVANT, YOUR HONOR, IN THAT IT SHOWS THAT WHEN IT COMES TO PUNITIVE [14] FINES OR PUNITIVE CIVIL PENALTIES, THE SUPREME COURT HAS BEEN VERY RELUCTANT TO HAVE A WAIVER INCLUDE THOSE THINGS. WE ARE NOT SEEKING THAT HERE. AND WE HAVEN'T SOUGHT IT IN THE COMPLAINT, AND WE HAVE MADE IT CLEAR IN OUR BRIEFS THAT WE ARE NOT SEEKING PENALTIES.

THIS IS ABOUT FEES, REASONABLE SERVICE CHARGES, THE SAME THAT EVERY OTHER POLLUTER OR DISCHARGER, AS THE TERM IS UNDER THE STATE WATER CODE, HAS TO PAY. AND THESE –

THE COURT: WHAT SECTIONS DO YOU RELY ON TO SHOW THAT THE UNITED STATES GOVERNMENT HAS WAIVED ITS SOVEREIGN IMMUNITY?

MR. NEVILLE: WE RELY ON BOTH OF THE SECTIONS, YOUR HONOR, IN THE CLEAN WATER ACT. SECTION 404(T), WHICH IS, OF COURSE, 33 U.S. CODE 1344(T), AND IN ADDITION THE COMPLIMENTARY SECTION 313(A), 33 U.S. CODE 1323(A), WHICH AFTER ALL, YOUR HONOR, TALKS ABOUT ANY BRANCH – HAS ANY BRANCH OF THE FEDERAL GOVERNMENT ENGAGED IN ANY ACTIVITY RESULTING OR WHICH MAY RESULT IN THE DISCHARGE OR RUNOFF OF POLLUTANTS? AND THERE IS NO QUESTION AND I BELIEVE NO DISPUTE BY THE UNITED STATES THAT THE CORPS IS ENGAGING IN JUST SUCH ACTIVITIES.

THE COURT: WHAT ABOUT THIS VERY IMPORTANT QUESTION AS TO WHAT BENEFITS THEY GET? WHAT, THE STATE, IT SEEMS TO ME, GETS ALL THE BENEFITS FROM HAVING THE CORPS DO THE DREDGING AND SUCH OTHER THINGS.

MR. NEVILLE: NO, YOUR HONOR. THERE ARE A NUMBER OF [15] BENEFITS. AND UNDER THE ANALYSIS OF *STATE OF MAINE*, WHICH WE SUBMIT IS RELEVANT HERE BECAUSE YOU'RE LOOKING AT CONSTRUCTION OF THE EXACT SAME PHRASE AS IT APPEARED IN ANOTHER STATUTE.

THE BENEFITS THAT THE CORPS GETS ARE MAINLY THOSE THAT ALL DISCHARGERS OF POLLUTANTS IN THE STATE OF CALIFORNIA GET FROM THE REGULATORY PROGRAMS AND THE FEES WHICH FUND PORTIONS OF THOSE PROGRAMS. THAT IS, IT MAY INCLUDE INSPECTIONS, IT CERTAINLY INCLUDES AT TIMES ON-SITE VISITS, IT INCLUDES REVIEW OF APPLICATIONS, DATA COLLECTION, AVAILABLE HEARINGS, ALL OF THE THINGS, YOUR HONOR, THAT ARE AIMED TOWARD ENSURING COMPLIANCE WITH THE LAW. AND THAT IS A SPECIFIC DICTATE TO THE STATE BY THE FEDERAL GOVERNMENT. AND THAT' IS EXACTLY WHAT WE'RE DOING.

THE COURT: BUT THE *MAINE* CASE DEALT WITH REASONABLE FEES. AND THE QUESTION BEFORE THE COURT WAS WHETHER OR NOT THE FEES WERE UNREASONABLY HIGH. AND JUSTICE BREYER CONCLUDED THAT THE RCRA AND CERCLA DID NOT PROVIDE AN ADEQUATELY CLEAR WAIVER OF SOVEREIGN IMMUNITY FROM MAINE'S ESTATE CIVIL PENALTIES.

MR. NEVILLE: CIVIL PENALTIES, YOUR HONOR.

THE COURT: YEAH. AND HELD THAT SUMMARY JUDGMENT WASN'T APPROPRIATE UNDER THE ISSUE OF THE REASONABLENESS OF THE FEES.

MR. NEVILLE: RIGHT.

THE COURT: THAT THE FEDERAL GOVERNMENT HAD AGREED TO BE PAID. THAT IS A FAR CRY FROM THE *OHIO* CASE IT WOULD SEEM [16] TO ME.

MR. NEVILLE: I AM NOT SURE I UNDERSTAND YOUR ILLUSION TO THE OHIO CASE, YOUR HONOR, BUT CERTAINLY I THINK THAT THE – IT IS IN FACT THE REASONABLENESS OF THE FEES HAVE NOT BEEN CHALLENGED SO FAR IN THIS CASE, ALTHOUGH INDIRECTLY THEY JUST WERE IN THE ARGUMENT ABOUT THE DELINQUENT FEES ADDING UP TO OVER HALF A MILLION.

THE APPROACH THAT – IF I COULD JUST FINISH, YOUR HONOR, THAT JUDGE BREYER TOOK IN SORT OF BORROWING A PRONG OR TWO FROM THE *MASSACHUSETTS* TEST, HE WAS LOOKING AT A FAIR APPROXIMATION, I BELIEVE, AND IN LOOKING AT THAT, HE WAS MAKING IT CLEAR THAT THE SERVICES AND BENEFITS THAT HAD TO BE PROVIDED TO THE UNITED STATES AS A REGULATED ENTITY, ALTHOUGH THEY, TO SOME EXTENT, HAD TO BE ABOVE AND BEYOND WHAT WAS AVAILABLE TO THE BENEFIT OF REGULATION OF THE GENERAL PUBLIC, DID NOT HAVE TO BE A TIT-FOR-TAT SPECIFIC ALLOCATION IN THE WAY THAT THE UNITED STATES SEEMS TO APPLY IT.

I SPENT MY OPPOSITION BRIEF AND MUCH OF MY SUPPLEMENTAL BRIEF GOING THROUGH THE AVAILABLE SERVICES AND BENEFITS. AND THEY ARE, IN FACT – AND I GUESS ON A MOTION TO DISMISS, OUR MAIN POINT IS WE WILL IN DISCOVERY AND WITH AFFIDAVITS AND ON MOTIONS FOR

SUMMARY JUDGMENT OR WITH WITNESSES AT TRIAL, DELINEATE EXACTLY AND PRECISELY TO THE BEST OF OUR ABILITY THE AMOUNT OF MONEY THAT WAS SPENT ON REVIEW OF THESE APPLICATIONS, ON HEARINGS, INSPECTIONS, ON-SITE VISITS, [17] DATA COLLECTION, IF APPLICABLE.

THE COURT: I AM READY TO GET TO THAT AFTER WE DETERMINE WHAT THE LAW IS.

MR. NEVILLE: I UNDERSTAND, YOUR HONOR.

THE COURT: THE LAW IS WHAT WE ARE TRYING TO –

MR. NEVILLE: SO I THINK THE *STATE OF MAINE* –

THE COURT: GIVE ME A CHANCE, IF YOU WOULD.

MR. NEVILLE: YES, YOUR HONOR.

THE COURT: IN THE *STATE OF MAINE* CASE, THE UNITED STATES CONCEDED THAT IT OWED SERVICE CHARGES, BUT ARGUED THAT THE FEES ASSESSED WERE UNREASONABLE.

AND SINCE THE UNITED STATES CHALLENGES THE IMPOSITION OF THE SERVICE CHARGE FEES ON SOVEREIGN IMMUNITY GROUNDS, I DON'T UNDERSTAND WHAT RELEVANCE *MAINE* HAS IN DECIDING THAT ISSUE, IN DECIDING THE ISSUE OF SOVEREIGN IMMUNITY. IT IS A DIFFERENT CASE.

THE GOVERNMENT CONCEDED IN THAT CASE THAT IT OWED SERVICE CHARGES AND SIMPLY ARGUED THAT THEY WERE UNREASONABLE.

MR. NEVILLE: WELL, I THINK IF YOU – I DON'T HAVE IT IF [sic] IN FRONT OF ME, BUT I THINK IN TAKING A LOOK AT THE PRONG OF *MASSACHUSETTS* AND ALSO TAKING A LOOK AT – MENTIONING AT LEAST THE TOTALITY OF CIRCUMSTANCES TEST IN THE *CITY OF COLOMBIA*, THAT THE COURT WAS USING AN ANALYSIS, BORROWING IT, IF YOU WILL, FROM ANOTHER RELATED FIELD, AND THAT IS IN SOME RESPECTS WHAT I AM SUGGESTING SHOULD HAPPEN HERE.

[18] BECAUSE WE DON'T HAVE, OF COURSE, A CASE ON POINT WITH THE EXCEPTION OF THE CLEAN AIR ACT CASE, SECTION 118 FROM THE CENTRAL DISTRICT. AND THAT'S NOT ON POINT TO THE CLEAN WATER ACT, BUT WITH EXTREMELY SIMILAR LANGUAGE FROM THE FORMER VERSION OF THE CLEAN AIR ACT.

THE COURT: THAT CASE WAS DECIDED TWO YEARS BEFORE THE *OHIO* CASE WAS DECIDED.

MR. NEVILLE: THAT'S CORRECT, YOUR HONOR. ALTHOUGH I THINK IT WOULD HAVE BEEN DECIDED SIMILARLY NOW –

CAN I JUST THROW OUT ONE THING, THAT WE SHOULD KEEP IN MIND THAT WHILE PLAIN AND UNAMBIGUOUS WAIVERS ARE CERTAINLY REQUIRED, THAT THE COURTS HAVE ALSO – I MEAN, THE SUPREME COURT AND OTHER COURTS

HAVE ALSO ADMONISHED COURTS NOT TO NARROW THE WAIVER OR WAIVERS THAT CONGRESS HAS INTENDED.

THE COURT: IT MUST VERY NARROWLY BE CONSTRUED ON THE CONTRARY –

MR. NEVILLE: IT MUST BE NARROWLY CONSTRUED, BUT NOT NARROWER THAN WHAT CONGRESS HAD IN MIND.

THE COURT: YOU TALKED ABOUT THE *MASSACHUSETTS* CASE. WOULD IT BE YOUR VIEW THAT THE COURTS HAVE USED *MASSACHUSETTS* TO DECIDE WHETHER THE CHARGES HERE ARE, IN FACT, SERVICE CHARGES PERMISSIBLE UNDER 1323(A)? SHOULD WE USE THAT THREE-PRONG FRAMEWORK? I AM LOOKING FOR SOME HANDLES.

IS THAT A WAY TO LOOK AT IT? SHALL I PROCEED THAT WAY?

[19] MR. NEVILLE: IT IS A WAY TO LOOK AT IT, YOUR HONOR, AND I WOULD SUBMIT THERE IS NO BLACK LETTER LAW, OBVIOUSLY, OR YOU WOULDN'T BE ASKING ME THAT QUESTION.

BUT I THINK A WAY TO APPROACH IT IS TO LOOK AT *CITY OF COLOMBIA*, SO IN THAT SENSE – TO THAT EXTENT I AGREE WITH THE COUNSEL FOR THE UNITED STATES. LOOK AT *CITY OF COLOMBIA* AND THE VERY MUCH SPECIFIC FACTS DRIVEN ANALYSIS OF TOTALITY OF THE CIRCUMSTANCES, WHICH CAN THEN ENCOMPASS BY INCORPORATION THE *MASSACHUSETTS* TEST, WHICH I BELIEVE WE CAN MEET AS WELL, AND IN ADDITION STATE

LAW AS EXPRESSED IN THE *SINCLAIR PAINT* WITH A VERY TOTALITY OF CIRCUMSTANCES –

THE COURT: YOU PUT EVERYTHING IN A BIG BOWL AND MIX THEM UP.

MR. NEVILLE: THAT'S CORRECT, YOUR HONOR. AND LOOK TO, AS THE COURT IN *CITY OF COLOMBIA* SAID THE ESSENTIAL IN NATURE OF THE FEE AT ISSUE.

WHAT WE ARE TALKING ABOUT HERE UNDER BOTH JUSTICE BREYER'S ANALYSIS IN *MAINE* AS WELL AS THE CALIFORNIA SUPREME COURT IN *SINCLAIR* IS A CLASSIC REGULATORY FEE. AND THUS, ALTHOUGH IN FACT INCENTIVES TO REDUCE POLLUTION ARE CERTAINLY PART OF THE MIX, THEY ARE BOTH BY NO MEANS ALL OF THE MIX AND THEY ARE BY NO MEANS DEFINITIVE.

THE COURT: ALL RIGHT.

MR. NEVILLE: CAN I LEAVE YOU WITH ONE MORE THOUGHT, YOUR HONOR?

[20] THE COURT: YES.

MR. NEVILLE: 33 U.S. CODE 1342(B) IS A PROVISION OF THE CLEAN WATER ACT WHEREIN FEDERAL LAW ACTUALLY REQUIRES ADDITIONAL REVIEW OF STATE PERMIT APPLICATIONS SUBMITTED TO THE STATE WATER BOARD BY –

THE COURT: WHERE DO I – WHERE ARE YOU READING FROM, D WHAT?

MR. NEVILLE: THAT'S 33 U.S. CODE 1342(D) AS IN DOG SMALL D.

THE COURT: 1342?

MR. NEVILLE: I'M SORRY. 33 U.S. CODE 1342(D) OF THE CLEAN WATER ACT, WHICH IS ITSELF CITED BY THE SUPREME COURT IN THE *EPA VERSUS STATE WATER BOARD* CASE AT 426 U.S. 208. AND COINCIDENTALLY 40 CFR 123.43 AND 40 CFR 123.44 ARE THE FEDERAL ADMINISTRATIVE EXPRESSIONS OF THAT.

BUT THE POINT I AM TRYING TO MAKE IS THAT THAT SUBSECTION REQUIRES THAT WHENEVER THE STATE GETS A PERMIT APPLICATION FROM A DISCHARGER OF POLLUTANTS, INCLUDING THE CORPS OF ENGINEERS, IT IS REQUIRED TO REVIEW THAT, PROCESS IT, AND SUBMIT IT TO THE U.S. EPA, FEDERAL EPA FOR REVIEW BASICALLY SO THEY CAN EITHER APPROVE IT OR VETO IT.

NOW THAT IS AN ADDITIONAL SERVICE ABOVE AND BEYOND THE SERVICES SPECIFIED IN THE CLEAN WATER ACT.

THE COURT: WHAT DIFFERENCE DOES THAT MAKE TO WHAT WE ARE TALKING ABOUT?

[21] MR. NEVILLE: IT IS, IN FACT, A BENEFIT AND SERVICE FROM THE POINT OF VIEW OF ENSURING COMPLIANCE. THAT IS WHAT THIS IS ALL ABOUT, ENSURING COMPLIANCE BY THE CORPS OF ENGINEERS AS A REGULATED AGENCY, ENSURING COMPLIANCE BY THE FEDERAL EPA –

THE COURT: IS IT YOUR POINT THAT THE STATE OF CALIFORNIA ISSUES TO THE CORPS OF ENGINEERS A PERMIT IN RETURN AND ALSO

CHARGES THE UNITED STATES FOR THE PERMIT, AND THAT FOLLOWING THAT, THE UNITED STATES GETS THE BENEFIT OF HAVING THE STATE OF CALIFORNIA SUBMIT THAT TO AN EPA COMMISSION?

MR. NEVILLE: THAT IS ONE PART OF IT, YOUR HONOR. BUT THE POINT IS THE WHOLE STATUTORY SCHEME, WHICH IS, AFTER ALL, AIMED AT COMPLYING WITH FEDERAL LAW, ENSURES THE COMPLIANCE OF THE CORPS AS A POLLUTER.

THE COURT: ALL RIGHT.

MR. NEVILLE: AND I WOULD JUST SUBMIT WITH REGARD TO THE MORE EXPLICIT LANGUAGE IN THE ONE SECTION OF THE CLEAN WATER ACT VERSUS THE OTHER, HOW CAN, IN FACT, REQUIREMENTS MEAN SOMETHING COMPLETELY DIFFERENT IN ONE FROM THE OTHER?

THAT WOULD BE – I DON'T UNDERSTAND THE ARGUMENT THAT WE ARE GOING TO TAKE THE ONE SECTION AND SAY THE REQUIREMENTS INCLUDES PERMITS, REASONABLE SERVICE CHARGES AND SPECIFIC SOVEREIGN IMMUNITY WAIVER OVER HERE, BUT IT DOESN'T HERE. BUT –

THE COURT: NOW WAIT A MINUTE. IF YOU WANT TO MAKE [22] THE POINT YOU HAVE TO MAKE IT WITH ME WITH PRECISION.

MR. NEVILLE: YES.

THE COURT: I AM LOOKING AT 1344 AND IT SAYS: EACH SUCH AGENCIES SHALL COMPLY WITH SUCH STATE OR INTERSTATE REQUIREMENTS, BOTH SUBSTANTIVE AND PROCEDURAL, TO CONTROL

THE DISCHARGE OF DREDGE OR FILL MATERIAL TO THE SAME EXTENT THAT ANY PERSON WOULD.

MR. NEVILLE: YES.

THE COURT: NOW THEN I DON'T FIND THAT IN THESE 1323. WILL YOU POINT IT OUT TO ME, PLEASE?

MR. NEVILLE: IN 33 U.S. CODE 1323, BEAR WITH ME, YOUR HONOR, PLEASE.

THE COURT: SHALL APPLY TO ANY REQUIREMENT?

MR. NEVILLE: SHALL BE SUBJECT TO AND COMPLY WITH ALL FEDERAL, STATE, INTERSTATE AND LOCAL REQUIREMENTS. THAT IS 33 U.S. CODE 1323.

AND THEN PARAPHRASING A BIT, INCLUDING REASONABLE SERVICE CHARGES, INCLUDING PERMIT REQUIREMENTS, NOTWITHSTANDING IMMUNITY.

NOW THE KEY, ONE OF THE KEY WORDS IS CERTAINLY THE WORD "REQUIREMENTS". AND YOU HAVE THE VERY SAME, YOU HAVE THE VERY SAME STATUTE, THE CLEAN WATER ACT.

THE COURT: THERE IS NONE OF THAT INCLUDING BUSINESS IN HERE THAT I CAN FIND.

MR. NEVILLE: YOUR HONOR, YES, I BELIEVE IT IS [23] THERE. 313(A) OF THE CLEAN WATER ACT, 33 U.S. CODE 1323(A) WHICH SPECIFICALLY APPLIES, EVEN THOUGH IT DOESN'T MENTION DREDGING, IT CERTAINLY APPLIES TO

DISCHARGE AND RUNOFF OF POLLUTANTS, AND THAT IS UNDISPUTED. THAT IS WHAT WE ARE TALKING ABOUT HERE.

THE COURT: INCLUDING THE PAYMENT OF REASONABLE SERVICE CHARGES.

ALL RIGHT. I WILL HEAR FROM THE GOVERNMENT.

MR. NEVILLE: THANK YOU, YOUR HONOR.

MS. QUAST: THANK YOU, YOUR HONOR. I ONLY HAVE TWO POINTS IN REPLY, WHICH IS, FIRST OF ALL, THE ARGUMENT THAT COUNSEL WAS JUST MAKING BASED ON 33 U.S.C. SECTION 1342(D). THIS IS THE FIRST TIME I HAVE HEARD THIS ARGUMENT. IT WASN'T MENTIONED ANYWHERE IN THE PAPERS.

SO THAT'S ACTUALLY A VERY DIFFERENT SECTION OF THE CLEAN WATER ACT. IT IS ABOUT A DIFFERENT TYPE OF PERMITS FOR DIFFERENT SET OF DISCHARGES. I HAVEN'T HAD AN OPPORTUNITY TO REVIEW THAT, AS I SAID, THIS IS THE FIRST I HAVE HEARD OF IT. I QUESTION ITS RELEVANCE AT THIS POINT, BUT I WOULD NEED TO TAKE A LOOK AT IT BEFORE I NEED TO COMMENT MORE FULLY.

THE COURT: IT IS CALLED BLINDSIGHTING.

MS. QUAST: THANK YOU.

MY SECOND POINT IS YOU CAN AVOID THE WHOLE ISSUE OF WHAT IS A SERVICE CHARGE, YOUR HONOR, BY FOCUSING ON 1344(T), WHICH IS SPECIFICALLY A SPECIFIC WAIVER OF SOVEREIGN

IMMUNITY [24] WITH REGARD TO DREDGING ACTIVITIES.

AND AS YOUR HONOR HAS NOTED, THERE'S NO MENTION IN THERE OF SERVICE CHARGES, AND AS I POINTED OUT, THERE'S NO MENTION OF MONETARY ASSESSMENTS OF ANY KIND.

THE COURT: ALL RIGHT. THE CASE IS SUBMITTED.

CALL THE NEXT CASE.

MR. NEVILLE: YOUR HONOR?

THE COURT: CASE IS SUBMITTED. AND IT IS SUBMITTED. IT IS OVER AT THIS TIME.

(PROCEEDINGS ADJOURNED.)

CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 24, INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO

TYPEWRITING BY COMPUTER TO THE BEST OF MY ABILITY.

/s/ Diane E. Skillman
DIANE E. SKILLMAN,
CSR #4909
OFFICIAL COURT
REPORTER, USDC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE
WILLIAM H ORRICK, JUDGE

STATE OF CALIFORNIA, PLAINTIFF, VS. UNITED STATES OF AMERICA, DEFENDANT.	)	NO. C 98-0792 WHO

SAN FRANCISCO, CALIFORNIA
THURSDAY, AUGUST 6, 1998

APPEARANCES:

FOR PLAINTIFF: STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
50 FREMONT STREET – SUITE 300
SAN FRANCISCO, CALIFORNIA 94105
BY: MICHAEL W. NEVILLE,
DEPUTY ATTORNEY GENERAL

FOR DEFENDANT: UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENTAL AND NATURAL RESOURCES
P.O. BOX 23986
WASHINGTON, D.C. 20026

BY: SYLVIA QUAST, TRIAL ATTORNEY

REPORTED BY: DIANE E. SKILLMAN, OFFICIAL COURT REPORTER

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

THURSDAY, AUGUST 6, 1998 2:00 P.M.

[2] THE CLERK: CALLING CIVIL 98-0792 STATE OF CALIFORNIA VERSUS UNITED STATES OF AMERICA.

COUNSEL, COME FORWARD AND STATE YOUR APPEARANCE FOR THE RECORD.

MR. NEVILLE: YOUR HONOR, I AM MICHAEL NEVILLE FOR THE CALIFORNIA ATTORNEY GENERAL'S OFFICE REPRESENTING PLAINTIFF.

MS. QUAST: YOUR HONOR, GOOD AFTERNOON, SYLVIA QUAST FOR THE DEPARTMENT OF JUSTICE ON BEHALF OF THE ARMY CORPS OF ENGINEERS.

THE COURT: MS. QUAST, I WILL HEAR FROM YOU.

MS. QUAST: YOUR HONOR, I REALLY DON'T HAVE ANYTHING TO ADD THAT'S ANYTHING BEYOND WHAT WE ALREADY HAVE IN OUR PAPERS.

THIS IS A STRAIGHTFORWARD, PURE LEGAL QUESTION ABOUT WHETHER SOVEREIGN IMMUNITY HAS BEEN WAIVED FOR THESE ASSESSMENTS UNDER THE CLEAR WATER ACT AND WHETHER THE

ASSESSMENTS IN QUESTION ARE UNCONSTITUTIONAL UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION.

IF YOU HAVE ANY QUESTIONS, HOWEVER, I WILL BE HAPPY TO ANSWER THEM.

THE COURT: YOU STATE THE QUESTIONS VERY CLEARLY.

WHAT DO YOU THINK WOULD HAPPEN TO YOU IF YOU MADE [3] THAT OPENING REMARK IN THE SUPREME COURT OF THE UNITED STATES? IT'S SIMPLY A LEGAL QUESTION. I DON'T ARGUE LEGAL QUESTIONS, IS THAT IT? YOU HAVE NOTHING TO ARGUE?

MS. QUAST: WELL, YOUR HONOR –

THE COURT: IT IS ASTONISHING. THE UNITED STATES OF AMERICA STANDS UP HERE AND SAYS IT IS A PERFECT, SIMPLE LEGAL QUESTION AND WE DON'T NEED ANY ARGUMENT ON IT. I CAN'T BELIEVE IT.

MS. QUAST: YOUR HONOR, WE HAVE STATED OUR ARGUMENTS. I WAS FOLLOWING UP ON WHAT YOU WERE SAYING EARLIER ABOUT THE IMPORTANCE OF HAVING IT WRITTEN BEFORE YOU, AND I TRIED TO PUT ALL MY ARGUMENTS IN THE BRIEF. I CAN RESTATE THOSE ARGUMENTS, BUT I DON'T WANT TO WASTE THE COURT'S TIME.

THE COURT: IF YOU DON'T WANT TO ARGUE IT'S ALL RIGHT WITH ME. I CAN'T UNDERSTAND IT.

MR. NEVILLE?

MR. NEVILLE: YOUR HONOR, I DO HAVE A FEW ADDITIONAL POINTS AND A COUPLE OF THINGS THAT OCCURRED TO ME SINCE I WROTE MY BRIEF.

THE COURT: I WOULD HOPE SO. I DON'T KNOW WHAT HOPE YOU COULD ARGUE IN YOUR BRIEF. AS COUNSEL FOR THE GOVERNMENT SAYS, IT IS A SIMPLE, LEGAL QUESTION.

HOW DOES THE STATE FEEL ABOUT ARGUING? DO YOU LIKE TO ARGUE LEGAL QUESTIONS? I ARGUE THEM ALL THE TIME WITH MY LAW CLERKS, AND I USED TO ENJOY IT WHEN I WAS A LAWYER. BEST [4] FUN THERE IS. AND YOU HAVE TO LEARN AS A LAWYER THAT YOU HAVE TO EDUCATE THE JUDGE.

GO AHEAD, MR. NEVILLE SINCE THE GOVERNMENT HAS WAIVED ITS ARGUMENT.

MR. NEVILLE: YOUR HONOR, I WILL FOCUS FIRST ON THE GOVERNMENT'S REPLY BRIEF.

FIRST OF ALL, THE CASE OF *DEPARTMENT OF ENERGY VERSUS OHIO* HAS BEEN CITED REPEATEDLY. WE FEEL THAT'S UTTERLY DISTINGUISHABLE. THAT'S A FINE CASE, BUT IT OBVIOUSLY DEALT WITH PUNITIVE FINES. PUNITIVE FINES ARE NOT AN ISSUE HERE.

THE STATE IS MERELY SEEKING REASONABLE FEES THAT ARE ASSESSED TO ALL POLLUTERS, TO ALL DISCHARGERS. THE CORPS OF ENGINEERS IS ONE OF THOSE DISCHARGERS AND WE ARE ASKING

THAT THE REASONABLE SERVICE CHARGES BE REIMBURSED. IT'S BEEN FIVE OR SIX YEARS SINCE WE RECEIVED PAYMENT ON THIS, AND THE BILL IS MOUNTING, AND WE VERY MUCH LIKE TO SEE THE GOVERNMENT PAY THE DELINQUENT FEES.

THE COURT: WHAT IS THE –

MR. NEVILLE: WE DO NOT HAVE A CIVIL PENALTY – WE ARE NOT SEEKING CIVIL PENALTIES; WE ARE NOT SEEKING PUNITIVE FINES.

THE COURT: YOU HAVE TO HAVE AN UNEQUIVOCAL WAIVER OF THE NATIONAL GOVERNMENT'S SOVEREIGN IMMUNITY.

MR. NEVILLE: YES, YOUR HONOR.

THE COURT: WHERE DO YOU FIND THAT WAIVER?

[5] MR. NEVILLE: WE FIND THAT IN THE WORD "REQUIREMENTS", WE FIND THAT IN THE WORD "REASONABLE SERVICE CHARGES" WHICH ARE GIVEN AS AN EXPRESS EXAMPLE, YOUR HONOR, OF REQUIREMENTS. YOU FIND IT IN THE OTHER REFERENCES IN THE CLEAN WATER ACT SPEAKING ABOUT THE PERMIT. AND I –

THE COURT: WELL, THE – AND THEN THE *OHIO* CASE, THE COURT DETERMINED THAT THAT LANGUAGE WAIVING IMMUNITY FOR QUOTE "ALL REQUIREMENTS" UNQUOTE OF THE STATE DID NOT ALLOW *OHIO* TO RECOVER PUNITIVE FEES FROM THE UNITED STATES.

MR. NEVILLE: THAT'S CORRECT, YOUR HONOR. AND THERE IS ACTUALLY, THERE IS A WHOLE LONG LINE OF CASES THAT SAYS WHEN IT COMES TO PUNITIVE PENALTIES, THAT – IN EFFECT, THE COURTS REQUIRE A HIGHER STANDARD. THAT'S NOT INCLUDED IN THE REQUIREMENTS AND THAT'S WHY WE ARE NOT SEEKING IT HERE.

BUT HERE –

THE COURT: ARE YOU MAKING A DISTINCTION BETWEEN PUNITIVE FEES AND – AREN'T YOU – DON'T YOU CHARGE – ISN'T IT A MISDEMEANOR TO EMPTY WASTE INTO THE ANY OF THESE WATERS?

MR. NEVILLE: YOUR HONOR, YOU'RE ABSOLUTELY RIGHT. UNDER STATE LAW IT WOULD BE FOR A DISCHARGER WHO HAD VIOLATED THE LAW, AS THE UNITED STATES HAS BEEN.

HOWEVER, WE VIEW IT DIFFERENTLY WITH REGARD TO THE UNITED STATES. WE RECOGNIZE THAT – SEVERAL CASES THAT HAVE ESSENTIALLY RULED OUT FOR US IN THIS – UNDER THESE CIRCUMSTANCES PUNITIVE FINES OR CIVIL PENALTIES AND WE ARE NOT [6] SEEKING THEM.

THE COURT: ALL RIGHT.

DO YOU WANT TO SAY ANYTHING ELSE?

MR. NEVILLE: YES, YOUR HONOR.

ON *ENVIRONMENTAL PROTECTION AGENCY VERSUS STATE OF CALIFORNIA*, THE SUPREME COURT THERE DID TALK ABOUT SERVICE CHARGES AND FOUND THAT THEY DID NOT AUTOMATICALLY

SUBJECT THE FEDERAL GOVERNMENT TO ALL CHARGES THAT DEFRAY STATE REGULATORY COSTS.

HOWEVER, IN A CASE WHICH I DID NOT CITE IN MY BRIEF AND I, IN RETROSPECT, SHOULD HAVE, A VERY IMPORTANT CASE, I THINK IT IS DISPOSITIVE OF THIS MOTION, YOUR HONOR, *STATE OF MAINE VERSUS DEPARTMENT OF NAVY*.

THE COURT: I AM NOT INTERESTED IN CASES THAT AREN'T CITED IN THE BRIEF.

MR. NEVILLE: YOUR HONOR, COULD I, AT LEAST, GIVE THE CITATION FOR THE RECORD? IT WAS AN OVERSIGHT ON MY PART. IT WAS CITED IN THE GOVERNMENT'S BRIEF, SO THEY WERE AWARE OF IT.

THAT IS 973 F.2D 1007, FIRST CIRCUIT, 1992.

AND IN VIEWING THE *ENVIRONMENTAL PROTECT* [sic] *AGENCY CASE*, JUDGE BREYER IN THAT CASE MADE IT VERY CLEAR THERE WAS AN ENTIRELY DIFFERENT SITUATION BECAUSE IN THE *ENVIRONMENTAL PROTECTION AGENCY* A PRIOR VERSION, NOT THE VERSION WE ARE DEALING WITH HERE, OF THE CLEAN WATER ACT DID NOT MAKE IT CLEAR [7] AT ALL THAT THE FEDERAL GOVERNMENT WAS EVEN SUBJECT TO A PERMIT, THE PERMIT REQUIREMENT. THAT IT EVEN HAD TO GET THE PERMIT IN THE FIRST PLACE.

UNDER THOSE CIRCUMSTANCES, THE SUPREME COURT SAID THAT REASONABLE SERVICE CHARGES WAS NOT ENOUGH TO DO THE TRICK.

BUT THIS IS A DIFFERENT SITUATION AS THE *STATE OF MAINE* RECOGNIZED BECAUSE IN THAT CASE THEY HAD FEES WHICH WERE VERY CLOSELY ANALOGOUS –

THE COURT: DON'T ARGUE THE CASES IF IT'S NOT IN YOUR BRIEF.

I COME OUT HERE PREPARED, OR IN THE BEST WAY THAT I CAN. AND YOU HAVE OTHER CASES THAT YOU FIND ON YOUR WAY IN AND YOU OVERLOOK. I CANNOT ARGUE WITH YOU. AND I AM UNWILLING, BECAUSE I AM A LAWYER, TO ACCEPT YOUR WORD FOR WHAT THE CASE SAYS, ANY MORE THAN YOU WOULD, IF YOU ARE A GOOD LAWYER, WHICH YOU ARE BEING IN THE DEPARTMENT, YOU ALMOST WANT TO QUESTION WHETHER THE JUDGE IS STATING CORRECTLY WHAT THE CASE HOLDS.

MR. NEVILLE: WELL, YOUR HONOR, I APPRECIATE WHAT YOU'RE NOTING THERE.

I JUST WOULD SAY THAT I RESPONDED, YOU KNOW, I RESPONDED TO THE OPENING BRIEF AND THEN WHEN I GOT THE REPLY BRIEF THERE WERE DOZENS OF ISSUES IN THE OPENING BRIEF AND THINGS HAVE BEEN FOCUSED DOWN, AND I REALIZED THAT AT THAT POINT THE *STATE OF MAINE VERSUS DEPARTMENT OF NAVY*, WHICH THE GOVERNMENT HAD CITED, NEEDED FURTHER DISCUSSION.

[8] IF YOU BEAR WITH ME, I HAVE ABOUT FOUR MINUTES OF DISCUSSION AND SOME ADDITIONAL

CITES TO THE CALIFORNIA WATER CODE THAT I THINK BEAR DIRECTLY ON –

THE COURT: IF YOU WOULD LIKE TO CONTINUE THIS HEARING UNTIL YOU CAN BE PROPERLY PREPARED, AND MAYBE THE GOVERNMENT WOULD WANT TO CONTINUE IT SO THEY HAVE AN OPPORTUNITY TO ARGUE WHAT I THINK IS A PRETTY IMPORTANT CASE.

MR. NEVILLE: WELL I –

THE COURT: THAT IS THE THING TO DO.

MR. NEVILLE: I WOULD BE AMENABLE TO THAT, YOUR HONOR, IF THAT IS THE ONLY WAY OF GETTING IT INTO THE RECORD, ALTHOUGH I AM PREPARED TO DO IT TODAY. BUT I UNDERSTAND YOU DON'T WANT ME TO.

THE COURT: I AM NOT BECAUSE IT IS NOT IN YOUR BRIEF.

I THINK I WILL CONTINUE THIS AND EXPECT BOTH SIDES TO BE PROPERLY PREPARED TO ARGUE THEIR BRIEFS AND THE LAW, BECAUSE I THINK IT IS VERY IMPORTANT BOTH TO THE STATE AND TO THE UNITED STATES.

SO, WE WILL CONTINUE THIS HEARING UNTIL THURSDAY AUGUST 20TH AT TWO O'CLOCK. THAT WILL BE THE ORDER.

PLEASE BE PREPARED. IF THERE IS ANYTHING IN THE GOVERNMENT'S REPLY BRIEF THAT YOU THINK YOU'VE BEEN BLIND SIGHTED ON, YOU MAY FILE AN ADDITIONAL MEMORANDUM.

ALL RIGHT. THAT IS THE ORDER.

[9] MR. NEVILLE: YOUR HONOR, COULD I JUST MAKE ONE REQUEST? AUGUST 20TH WAS THE DAY I WAS SUPPOSED TO BE IN THE MOUNTAINS WITH MY CHILDREN FOR A SUMMER VACATION.

THE COURT: ALL RIGHT. AUGUST 27 TH?

MR. NEVILLE: 27 TH.

THE COURT: IS THAT ALL RIGHT WITH YOU MS. QUAST?

MS. QUAST: THAT WILL BE FINE, YOUR HONOR. THANK YOU.

THE COURT: AUGUST 27 AT 2:00 P.M. WE WILL CONTINUE THE HEARING.

CALL THE NEXT CASE.

(PROCEEDINGS ADJOURNED.)

CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 9, INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL

COURT REPORTER OF THE PROCEEDINGS HEREIN-BEFORE ENTITLED, AND REDUCED TO TYPEWRITING BY COMPUTER TO THE BEST OF MY ABILITY.

/s/ Diane E. Skillman
DIANE E. SKILLMAN,
CSR #4909
OFFICIAL COURT
REPORTER, USDC

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Attorneys for State of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

STATE OF CALIFORNIA, Acting by and through the California State Water Resources Control Board, Plaintiff, v. UNITED STATES OF AMERICA; U.S. Department of Army, Corps of Engineers, Defendants.	**NO. C 97-2947 WHO**

STIPULATION AND WAIVER

WHEREAS, the State of California, acting by and through the State Water Resources Control Board ("State"), filed a "Complaint for Declaratory Relief, Injunctive Relief and to Compel Payment of Delinquent Fees" (see Attachment A, "federal court complaint" or

"original federal court complaint") on or about August 8, 1997, in the U.S. District Court for the Northern District of California, San Francisco, Case Number C97-2947 WHO;

WHEREAS, the United States of America and the U.S. Department of Army, Corps of Engineers ("United States") does not concur with, or admit, the allegations contained in the State's case;

WHEREAS, the United States asserts that the U.S. District Court lacks subject matter jurisdiction over the federal court complaint (see Attachment B, letter of November 24, 1997, from Sylvia Quast to Michael W. Neville) and the State asserts that subject matter jurisdiction does exist (see federal court complaint); and

WHEREAS, the State and the United States desire to promote judicial economy by avoiding unnecessary litigation where possible;

ACCORDINGLY, the parties agree and stipulate to the following:

1. The State refiled its complaint in California Superior Court for the City and County of San Francisco (see Attachment C) on January 30, 1998;

2. The State shall promptly dismiss the attached federal court complaint without prejudice;

3. Promptly after the State's dismissal of the federal court complaint, the United States shall remove the state case to the U.S. District Court, Northern District of California, in San Francisco, and the State shall not oppose such removal;

4. The parties believe that the steps taken in paragraphs one, two, and three herein should obviate the jurisdictional problem (if any such problem exists) identified in the attached letter of November 24, 1997; and

5. The parties agree that any statute of limitations defense that the United States would have had to the original federal court complaint is neither enhanced or impaired by the refiling, dismissal or removal of this case back to federal court. In other words, the parties agree that any applicable statute of limitations was tolled by the filing of the original federal court complaint on August 8, 1997, and such tolling is not affected by the refiling, dismissal or removal of this case back to federal court.

SO STIPULATED: DATED: February 3, 1998

/s/ Sylvia Quast
SYLVIA QUAST, Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P. O. Box 23986
Washington, DC 20026-3986

Attorney for United States of America

SO STIPULATED: DATED: February 2, 1998

/s/ Michael W. Neville
MICHAEL W. NEVILLE
Deputy Attorney General
California Department of Justice
50 Fremont Street, Suite 300
San Francisco, CA 94105-2239

Attorney for State of California,
Acting by and through the
California State Water Resources
Control Board

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Attorneys for Plaintiff State of California, Acting by and through the State Water Resources Control Board

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, Acting by and through the California State Water Resources Control Board, Plaintiffs, v. UNITED STATES OF AMERICA; U.S. Department of Army, Corps of Engineers, Defendants.	No. C-97-2947 WHO **COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND TO COMPEL PAYMENT OF DELINQUENT FEES** (Filed Aug. 8, 1997)

Plaintiff, the State of California, acting by and through the California State Water Resources Control Board (hereinafter, "State Water Board" or "State") brings

this action against federal defendants named herein and alleges that:

I. JURISDICTION AND VENUE

This is a civil action arising under the United States Constitution and the laws of the United States and the State of California.

1. This Court has jurisdiction over this action under 28 U.S.C. section 1331 (federal question jurisdiction for all civil actions arising under the Constitution, laws, or treaties of the United States), and under 28 U.S.C. section 1346 (United States as defendant). In addition, declaratory relief is appropriate under 28 U.S.C. section 2201 because an actual controversy has arisen and now exists between State plaintiff and federal defendants.

2. Venue is proper in the United States District Court for the Northern District of California pursuant to 28 U.S.C. section 1391(b) and (e) because defendants reside, or may be found in, this district and because a substantial part of the events or omissions giving rise to the claim occurred in the district.

II. PARTIES

3. Plaintiff State Water Resources Control Board is an agency of the State of California.

4. The State is divided into nine regions, each of which has a regional water quality control board. Water Code section 13201. Subject to review and oversight by

the State Water Board, each regional board is the principal state agency with primary responsibility for the coordination and control of water quality within that region. Water Code section 13001. The regional boards have direct responsibility for issuing waste discharge requirements to anyone who would discharge wastes into waters of the state. Water Code section 13263. This includes permits (called national pollutant discharge elimination system – NPDES – permits) issued under the authority of the federal Clean Water Act. Water Code section 13374. The State Water Board has a direct responsibility for assessing and collecting the annual fees that must be paid in conjunction with applications for waste discharge requirements. Water Code section 13260.

5. Defendant United States of America is a sovereign and body politic.

6. Defendant U.S. Department of Army Corps of Engineers (hereinafter, "Corps of Engineers") is an agency of the United States government, with an office in San Francisco, California. The Corps of Engineers and its agents and employees are charged with carrying out the requirements of federal law, including the Clean Water Act, 28 U.S.C. section 1251 *et seq.*, and with complying with applicable provisions of the California Water Code and the Code of California Regulations. Moreover, the Corps of Engineers has authority under the Clean Water Act to approve dredge and fill projects. 33 U.S.C. section 1344 (permits for dredged or fill material). In addition, the Corps itself performs dredging projects in California and is therefore subject to the requirements of California law with respect to the control and abatement of water pollution, including the requirement to pay reasonable

fees or service charges incident to its dredging operations.

III. STATUTORY BACKGROUND

A. Waivers of Federal Sovereign Immunity

7. The Clean Water Act, 28 U.S.C. Code 1251 *et seq.*, sets up the fundamental statutory scheme for addressing water pollution throughout the United States. In this Act, Congress declared as national policy that states have the primary responsibilities and rights to prevent, reduce, and eliminate pollution. 28 U.S.C. 1251(b). The Clean Water Act contains two explicit Congressional waivers of federal sovereign immunity, thus subjecting federal polluters to state regulation, including the reasonable fees which are the subject of this litigation. Section 313(a), 33 U.S.C. section 1323(a), entitled "Federal Facilities Pollution Control," states:

> "*Each* department, *agency*, or instrumentality of the executive, legislative, and judicial branches of the *Federal Government* (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of runoff of pollutants, and each officer, agent, or employee thereof in the performance of this official duties, *shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.* The preceding sentence

> shall apply (A) *to any requirement whether substantive or procedural* (including any record keeping or reporting requirement, and requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State or local courts or in any other manner. *This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. . . .* The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a [sic] requirement if he determines it to be in the paramount interest of the United States to do so." (Emphasis added.)

8. Moreover, Clean Water Act section 404(t), 33 U.S.C. section 1344(t), specifically waives immunity for state regulation of dredge and fill activities undertaken by the U.S. Army Corps of Engineers. Section 404(t) states:

> (t) Navigable waters within state jurisdiction: Nothing in this section shall preclude or deny the right of any State . . . agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of *any Federal agency,* and each such agency *shall comply with such State . . . requirements both substantive and procedural* to control the discharge of dredged or fill material to the same *extent that any person is subject to such requirements.* (Emphasis added.)

B. Waste Discharge Reports, Requirements and Fees

9. California Water Code section 13260 requires that any person discharging waste, or proposing to discharge waste, that could affect the quality of the waters of the state, other than into a community sewer system, shall file with the appropriate California regional water quality board a report of the discharge. Section 13260 further provides that each person for whom waste discharge requirements have been provided pursuant to section 13263 shall submit an annual fee not to exceed $10,000 according to a reasonable fee schedule established by the State Water Board (hereinafter referred to as "WDR fees"). Pursuant to section 13260(d)(2), all such WDR fees collected are deposited in the Waste Discharge Permit Fund which is available for expenditure by the State Water Board, upon appropriation by the Legislature, for *inter alia*, programs to control the quality of all the waters of the state, and to protect water quality from degradation. See Water Code section 13000. The State Water Board has established a reasonable fee schedule in subchapter 9, of Chapter 3 of Title 3, section 2200 of the California Code of Regulations, entitled "Waste Discharge Reports and Requirements."

10. The Corps of Engineers is currently, and has been in the past, involved in dredging and/or fill operations in the state of California. Corps of Engineers dredging/fill operations necessarily involve the discharge of "waste" within the meaning of California Water Code section 13050(d). Accordingly, the Corps of Engineers dredging operations are subject to the requirements of

section 13260, including the requirement to report waste discharges to the appropriate regional board, and the requirement to pay WDR fees established by the State Water Board.

C. Bay Protection and Toxic Cleanup Program and Fees

11. In Chapter 5-6 of Article 7 of Division 7 of the California Water Code, the Legislature established the Bay Protection and Toxic Cleanup Program (hereinafter referred to as "BPTCP"). See Water Code §§13390 *et seq.* The Purpose of the BPTCP is for the State Board and regional boards to establish programs that, *inter alia*,

> [P]rovide maximum protection for existing and future beneficial uses of bay and estuarine, waters, and that these *programs include a plan for remedial action at toxic hot spots*. It is also the intent of the Legislature that these program *further compliance with federal law* pertaining to the identification of waters where the protection and propagation of shellfish, fish, and wildlife are threatened by toxic pollutants and contribute to the development of effective strategies to control these pollutants. (Emphasis added.) Water Code § 13390.

California Water Code section 13396 prohibits dredging or otherwise disturbing toxic hot spot sites without first obtaining certification pursuant to Section 401 of the Clean Water Act (33 U.S.C. § 1341) or waste discharge requirements pursuant to the California Water Code. In addition, in Water Code section 13396.5, the Legislature required the State Water Board to establish annual fees

" . . . applicable to all point and non-point dischargers who discharge into enclosed bays, estuaries, or any adjacent waters . . . " These "BTCP" fees "shall create incentives to reduce discharges to the ocean, bays, and estuaries and shall be based on the relative threat to water quality from discharges." *Ibid.* In addition, in section 13396.5, the Legislature specifically required that the schedule of BPTCP fees should be set "at an amount sufficient" to fund BPTCP – related responsibilities and duties of the State Water Board, the Office of Environmental Health Hazard Assessment, and the Department of Fish and Game with a statutory cap of four million dollars ($4,000,000) per year. BPTCP fees collected are deposited in the Bay Protection and Toxic Cleanup Fund, which is available for expenditure by the State Water Board, upon appropriation by the Legislature, for bay protection and toxic cleanup purposes. Water Code section 13396.5(c). The State Water Board has established a fee schedule for dredging operations conducted with the scope of the Bay Protection and Toxic Cleanup Program at Title 23 of the California Code of Regulations at section 2236(c)(6).

12. Some of the Corps of Engineers' dredging/fill operations described in paragraphs six and ten, above, involve dredging or disturbing toxic hot spot sites and discharging waste material into enclosed bays, estuaries, or any adjacent waters in the contiguous zone or ocean. Accordingly, those Corps of Engineers dredging operations are subject to the requirements of Section 13396 and 13396.5, including the requirement to obtain certification or waste discharge requirements before dredging, and the

requirement to pay BPTCP annual fees for those operations as established by the State Water Board.

IV. CLAIM FOR RELIEF

13. The allegations set forth in paragraphs one through twelve, inclusive, are realleged and incorporated herein by reference.

14. During the period of time commencing in 1989 and continuing to the present, the State Water Board, by and through various regional water quality control boards, has lawfully assessed the Corps of Engineers WDR fees and BPTCP fees based on the Corps' multiple dredging operations in the state of California. During this period of time, the Corps of Engineers has unlawfully refused to pay many of these fee assessments, asserting the principle of sovereign immunity as an alleged defense for its non-payment. The current total of delinquent fees owed by the Corps of Engineers is believed to be at least $572,000.

15. Prejudgment interest from the date of assessment of each fee is owing and payable at the rate of 10% per annum, pursuant to California Civil Code sections 3287 and 3289, and other applicable law.

16. There is an actual controversy between plaintiff State Water Board and federal defendants since the Board asserts that its fees are calculated and imposed upon federal dredging operations in full compliance with applicable federal and state law. Federal defendants deny the foregoing and have refused to comply with applicable

law and regulations and refuse to pay lawfully assessed fees.

V. PRAYER FOR RELIEF

WHEREFORE, State plaintiff prays that:

1. This court enter a judgment declaring that:

a) The State Water Board's imposition, assessment, levy and collection of its WDR fees and BPTCP fees, and each of them, against federal dredging operations within the state comply fully with all applicable laws and regulations, including the Supremacy Clause of the U.S. Constitution;

b) Federal defendants who have failed or refused to pay fees assessed or imposed by the State Water Board are liable to the State for the full amount of such fees and any applicable late payment charges and prejudgment interest, according to proof;

c) To the extent that federal defendants have paid such fees to the State, they are not entitled to any refund of those fees by the State.

2. This court order federal defendants to pay all such fees previously assessed or imposed by the State and any applicable late payments and prejudgment interest, according to proof.

3. This court grant State plaintiff its costs of suit incurred herein.

4. This court grant such other relief as may be just and proper.

DATED: August 7, 1997

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Supreme Court, U.S.
FILED
DEC 5 2001
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(2)

No. 01-38

In the Supreme Court of the United States

STATE OF CALIFORNIA, ACTING BY AND THROUGH THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 404(t) of the Clean Water Act of 1977, 33 U.S.C. 1344(t), which provides that federal agencies shall comply with state "requirements * * * to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements," waives the federal government's immunity from state-imposed annual dredging assessments.

2. Whether Section 313(a) of the Clean Water Act, 33 U.S.C. 1323(a), which provides that federal agencies shall comply with state "requirements * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges," waives the federal government's immunity from state-imposed annual dredging assessments.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA, ET AL.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum order of the court of appeals (Pet. App. 1-2) is unreported. The opinion of the district court (Pet. App. 5-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2001 (Pet. App. 3-4). A petition for rehearing was denied on April 2, 2001 (Pet. App. 31-32). The petition for a writ of certiorari was filed on July 2, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States, through the Army Corps of Engineers, spends millions of dollars each year to maintain the navigability of California harbors through dredging. Notwithstanding the benefits of those federal dredging activities, petitioner has asserted that the activities subject the United States to payment of state-imposed annual fees that petitioner charges persons who discharge materials into navigable waters. The district court dismissed petitioner's suit for payment of those fees, concluding that the United States has not waived its immunity from those payments. Pet. App. 5-30. The court of appeals summarily affirmed for the reasons stated in the district court's decision. *Id.* at 1-2.

1. The United States Army Corps of Engineers performs dredging projects throughout the United States, including the State of California. Pet. App. 5-6; see *e.g.*, Water Resources Development Act of 1996, Pub. L. No. 104-303, 110 Stat. 3658. The purpose of those projects is to improve navigation in waterways and to provide "for water resources development and conservation and other purposes * * *." § 101(a), 110 Stat. 3662. Under the Water Resources Development Act of 1996, for example, Congress has authorized the Corps to spend millions of dollars in California on dredging Humboldt Harbor and Bay, Santa Barbara Harbor, Channel Islands Harbor, Los Angeles Harbor, Long Beach Harbor and the Port of Oakland. § 101(a)(3)-(7), 110 Stat. 3663. The Act establishes a cost-sharing arrangement pursuant to which the Corps

pays the majority of the dredging costs. §§ 101(a)(2), (4) and (6), 305, 307, 310, 110 Stat. 3663, 3712-3713.[1]

The Clean Water Act, which was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters, unless authorized by a permit. 33 U.S.C. 1311(a). Section 404 of the Act addresses discharges of dredged or fill material. 33 U.S.C. 1344. For discharges by federal agencies, Section 404(t), adopted in 1977, provides a limited waiver of federal immunity from state requirements. Clean Water Act of 1977, Pub. L. No. 95-217, § 67(b), 91 Stat. 1600. Section 404(t) states:

> Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

33 U.S.C. 1344(t).

At the same time that Congress added the specific, limited waiver of federal immunity in Section 404(t),

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[1] With respect to navigation projects authorized for Humboldt Harbor and Bay, California, for example, the total project cost is $15,180,000, with a federal share of $10 million and a non-federal share of $5,180,000.

requiring federal agencies to comply with state requirements to control the discharge of dredged or fill material, Congress amended Section 313(a) to clarify the waiver of federal immunity for federal activities resulting in the discharge or runoff of pollutants. Section 313(a) states in relevant part:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

33 U.S.C. 1323(a).

Under California law, the State Water Resources Control Board (Board) is authorized to collect annual

assessments for dredging activities in California. California Water Code Section 13260(a)(1) (West 1992 & Supp. 2001) requires "[a]ny person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state" to file a report of the discharge with the appropriate Regional Water Quality Control Board. See Pet. App. 33. Section 13260(d)(1) requires that each person for whom waste discharge requirements (WDRs) have been prescribed shall pay an annual fee of up to $10,000, with fees calculated on the basis of total flow, volume, number of animals, or area involved. Cal. Water Code § 13260(d)(1) (West 1992). See Pet. App. 34. The Board calls these payments "WDR fees." Compl. para. 9; Pet. App. 135. The Board has set a fee schedule in its implementing regulations, based on the discharge's threat to water quality and other factors set out in the regulations. Cal. Code Regs. tit. 23, § 2200(a)(2) (2001). All payments are deposited in the Waste Discharge Permit Fund, which is available for expenditure by the State Board, upon appropriation by the Legislature, "for *inter alia*, programs to control the quality of all the waters of the state, and to protect water quality from degradation." Compl. para. 9; Pet. App. 135 (citing Cal. Water Code § 13000 (West 1992)). Failure to pay the assessments under Section 13260 constitutes a misdemeanor and can result in civil penalties of up to $5000 per day. Cal. Water Code § 13261 (West 1992).[2]

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[2] The complaint also sought the payment of purportedly overdue dredging assessments under the Bay Protection and Toxic Cleanup Program (BPTCP), which required the State Board to "establish fees applicable to all point and nonpoint dischargers who discharge into enclosed bays, estuaries, or any adjacent waters in the contiguous zone or the ocean." See Compl. para. 11; Pet. App.

2. Petitioner brought this action in federal district court, asserting that the Corps is required to pay annual assessments for dredging the State's harbors and bays, pursuant to the California Water Code. Pet. App. 130-140. Pursuant to stipulation of the parties, petitioner re-filed the case in California Superior Court on January 30, 1998, and the United States removed the case to federal court. See *id.* at 127-129. The complaint alleged that petitioner had lawfully assessed WDR fees based on the Corps' dredging operations in the State, and it sought a declaratory judgment that such assessments are in compliance with applicable laws and regulations, including the Supremacy Clause of the United States Constitution. *Id.* at 138-139. The complaint asserted that the United States waived its immunity from those assessments through Sections 404(t) and 313(a) of the Clean Water Act. *Id.* at 133-134.

3. The United States moved to dismiss on the ground that it has not waived federal immunity for the state-imposed dredging assessments. The district court granted the motion, finding that "[t]he United States has not waived sovereign immunity for the types of assessments at issue here." Pet. App. 8. The court concluded that petitioner had not satisfied "the stringent requirements necessary to establish a waiver of federal sovereignty." *Id.* at 9.

136-137; Cal. Water Code § 13396.5(a) (West 1992). Until January 1, 1998, when the BPTCP program was repealed by its own terms, *id.* § 13396.5 (Supp. 2001), dischargers were to pay up to $30,000 annually, in addition to WDR fees owed under Cal. Water Code § 13260 (West 1992 & Supp. 2001). *Id.* § 13396.5(d) (1992). On appeal, petitioner withdrew its claim for BPTCP fees. See Pet. App. 72-73.

The court first found that federal immunity is not waived through Section 404(t) because the "requirements" language of that provision does not encompass the dredging assessment that petitioner seeks to impose here. The district court relied on this Court's decision in *United States Department of Energy (DOE)* v. *Ohio*,,503 U.S. 607 (1992), which interpreted similar language in the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* The Court concluded that a RCRA provision subjecting federal facilities to "all requirements" of state law, 42 U.S.C. 6961, subjected those facilities to "substantive standards and the means for implementing those standards, but excluding punitive measures." 503 U.S. at 627-628. The district court similarly reasoned that Section 404(t) subjected the federal government to state discharge control requirements, but not to monetary assessments for lawful dredging activities. Pet. App. 9-14.

The district court also held that petitioner failed to demonstrate a waiver of federal immunity under Section 313(a). The court found that Section 404(t), rather than Section 313(a), governs federal immunity with respect to the dredging assessments at issue here, because Section 404(t) specifically addresses the scope of the government's immunity respecting dredging activities, while Section 313(a) addresses pollution discharges generally. Pet. App. 15-16. The court further concluded that, even if Section 313(a) applied, it would not waive federal immunity for the dredging assessments. The court found that, as with Section 404(t), "the 'requirements' language of [Section 313(a)] is insufficient to effect a waiver of federal sovereign immunity." *Id.* at 16. In addition, the dredging assessments at issue here would not qualify as "reasonable service charges" under Section 313(a) because the

assessments are not "service charges" at all. *Id.* at 17-28. Petitioner provides "[n]o services or benefits * * * to the federal United States whatsoever" in return for those assessments; rather, petitioner imposes the assessments to "fund compliance efforts and to encourage less dredging." *Id.* at 25.

4. The court of appeals unanimously affirmed by unpublished memorandum opinion, relying on "the district court's well-reasoned opinion." Pet. App. 1-2. The court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc. *Id.* at 31-32.

ARGUMENT

The court of appeals correctly concluded that Congress has not waived the United States' immunity from petitioner's assessment of dredging fees. That decision is consistent with this Court's decision in *DOE* v. *Ohio*, *supra*, and does not conflict with any decision of this Court or of another court of appeals. The court's determination is factbound and does not present any question warranting this Court's review.

1. This Court has consistently adhered to the "common rule, with which we presume congressional familiarity, that any waiver of the National Government's sovereign immunity must be unequivocal." *DOE*, 503 U.S. at 615 (citation omitted). "Waivers of immunity must be 'construed strictly in favor of the sovereign,' *McMahon* v. *United States*, 342 U.S. 25, 27 (1951), and not 'enlarge[d] . . . beyond what the language requires.' *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927)." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983) (quoted in *DOE*, 503 U.S. at 615); *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986). See *e.g.*, *United States* v. *Williams*, 514 U.S.

527, 531 (1995). The "'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text," and may not be manifested through legislative history. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992).

2. The lower courts correctly held that Section 404(t) of the Clean Water Act fails to provide the required clear and unequivocal waiver of federal immunity for the dredging assessments at issue here. Congress has directed the Corps of Engineers to provide dredging services to States and localities, and it has also provided the majority of the funding for the dredging projects. Congress has further directed the Corps to comply with "State or interstate requirements" to control discharges of dredged or fill material, § 404(t), 33 U.S.C. 1344(t), but that direction does not require the Corps to pay state dredging assessments. As the district court correctly recognized, those dredging assessments are not "requirements" to control pollution, but instead are fees that petitioner imposes to generate revenue for state programs. See Pet. App. 12-13.

Petitioner is wrong in asserting that Section 404(t) of the Clean Water Act grants the States carte blanche to impose fees on federal dredging activities. As this Court's decision in *DOE* indicates, the term "requirements," when used in the context of federal pollution control laws, "can reasonably be interpreted as including substantive standards and the means for implementing those standards." 503 U.S. at 627. That term can also include "coercive fines" imposed to induce compliance "with injunctions or other judicial orders designed to modify behavior prospectively." *Id.* at 613, 626-627. But the term "requirements" cannot be stretched to subject the United States to punitive

measures, such as civil penalties. *Id.* at 627. Similarly, the term does not subject the United States to general fee assessments that "are not directly related to compliance mechanisms to implement substantive state dredging or discharge requirements." Pet. App. 12.

Petitioner argues that the fee assessments are permissible under this Court's decision in *DOE* because they are not "punitive." Pet. 11. The *DOE* decision does not, however, allow a State to subject the United States to any sort of non-punitive financial burden. Rather, petitioner must demonstrate that the congressionally enacted statutory text unambiguously subjects the United States to the dredging assessments at issue here. The court of appeals and the district court correctly recognized that petitioner had failed to carry that burden. The dredging assessments "do not fit within [Section 404(t)'s] narrow waiver of immunity discussed in *DOE*." Pet. App. 13. That decision by the district court and the court of appeals' summary affirmance of it do not conflict with any decision of this Court or of another court of appeals.[3]

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[3] Petitioner attempts "to bolster" its construction of Section 404(t) by reference to legislative history. Pet. 13-14 & n.5, 16 n.8. This Court, however, has squarely rejected the practice of inferring a waiver of sovereign immunity from such materials. As the Court has stated, the "'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text," and "[i]f clarity does not exist there, it cannot be supplied by a committee report." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992). Moreover, the cited history does not support petitioner's position. It makes no reference to the payment of any dredging or other fees or service charges, but states only that the Corps of Engineers "may be required by the States in some instances to expend additional funds to protect water quality." See Pet. 14.

3. The courts below also correctly held that Section 313(a) of the Clean Water Act, 33 U.S.C. 1323(a), does not waive federal immunity. They properly recognized that Section 404(t)—and not Section 313(a)—determines whether the federal government is subject to state dredging assessments. Section 404(t) explicitly addresses the obligations of federal agencies respecting dredging activities. See 33 U.S.C. 1344(t) ("[n]othing in this section shall preclude or deny the right of any State or interstate agency *to control the discharge of dredged or fill material* * * * including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural *to control the discharge of dredged or fill material* to the same extent that any person is subject to such requirements" (emphasis added)). As petitioner acknowledges, "section 404(t)'s waiver specifically addresses dredge/fill activities." Pet. 13. By contrast, Section 313(a) states more generally that federal agencies shall comply with state requirements "respecting *the control and abatement of water pollution* in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges." 33 U.S.C. 1323(a) (emphasis added).

Under well-established principles of statutory construction, where two statutory provisions, one general and one specific, potentially apply, the more specific provision controls. *Edmond* v. *United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *Busic* v. *United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence."); *Trustees of the Amalgamated Ins. Fund* v.

Geltman Indus., Inc., 784 F.2d 926, 930 (9th Cir.) ("Fundamental maxims of statutory construction require that a specific statutory section qualifies a more general section and will govern, even though the general provisions, standing alone, would encompass the same subject."), cert. denied, 479 U.S. 822 (1986); 1A Norman Singer, *Sutherland Statutory Construction* § 23.15, at 365-376 (5th ed. 1992). Here, Section 404(t) explicitly addresses dredge and fill activities, and it governs the dredging assessments at issue, rather than the more broadly applicable terms of Section 313(a) which are pertinent to the discharge, control and abatement of all other materials. See Pet. App. 15-16.

In any event, Section 313(a) would not provide a waiver of the federal government's immunity from the dredging assessments. Section 313(a)'s statement that the United States is subject to state "requirements" respecting the "control and abatement of water pollution" goes no further than Section 404(t) and is therefore ineffective to subject the federal government to the dredging assessments. See Pet. App. 16-17. And Section 313(a)'s further statement that the United States is subject to "reasonable service charges," 33 U.S.C. 1323(a), is also ineffective to subject the federal government to those assessments. The dredging assessments at issue here plainly are not "service charges" for the straightforward reason that the federal government does not receive any meaningful services from the State in exchange for the assessments. The district court expressly found that "[n]o services or benefits are provided to the * * * United States whatsoever." Pet. App. 25. That fact, by itself, is sufficient to establish that the dredging assessments "do not qualify as 'service charges' for which the United States has

waived its sovereign immunity under [Section 313(a)] of the CWA." *Ibid.*[4]

4. Petitioner contends (Pet. 20-28) that the district court's determination that the dredging assessments at issue here are not "service charges" conflicts in principle with *Jorling* v. *United States Department of Energy*, 218 F.3d 96 (2d Cir. 2000), and *Maine* v. *Department of Navy*, 973 F.2d 1007 (1st Cir. 1992). That contention is incorrect.

In *Jorling*, the State of New York sought payment of certain charges pursuant to provisions of RCRA that direct that federal agencies shall comply with state requirements respecting the control of solid waste or hazardous waste disposal, including "the payment of

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[4] In evaluating whether the dredging assessments are service charges, the district court employed the three-part test that this Court utilized in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), to distinguish between user fees and taxes for purposes of state immunity from federal taxation. See Pet. App. 18-24. See also *Jorling* v. *United States Dep't of Energy*, 218 F.3d 96 (2d Cir. 2000) (following that approach); *Maine* v. *Department of Navy*, 973 F.2d 1007, 1013-1014 (1st Cir. 1992) (same). Petitioner does not challenge the court's reliance on the *Massachusetts* test, which inquires specifically whether the charges at issue (1) discriminate against governmental functions; (2) are based on a fair approximation of use of the system or services provided; and (3) are structured to produce revenues that will not exceed the total cost of the benefits to be supplied. See 435 U.S. at 466-467. In any event, the same result would follow under the alternative approach that the district court considered, under which a court evaluates the character of the assessment under "all the facts and circumstances" of the proposed assessment. See Pet. App. 22-24. See also *United States* v. *City of Huntington*, 999 F.2d 71, 73 (4th Cir. 1993) (applying that test), cert. denied, 510 U.S. 1109 (1994); *United States* v. *City of Columbia*, 914 F.2d 151, 153 (8th Cir. 1990) (same). The decisive fact in this case is that "no services are in fact provided in return for payment." Pet. App. 25.

reasonable service charges" (42 U.S.C. 6961(a)). See 218 F.3d at 98. The United States did not contest that the charges at issue in that case were "service charges," but instead challenged them as unreasonably high. See *id.* at 99. Accordingly, the court of appeals addressed only whether the charges were "reasonable" and concluded that the "method for assessing waste regulatory charges has not been shown to be unreasonable as applied." *Id.* at 106.

The *Maine* decision also arose under RCRA, and the sole issue in that case, as in *Jorling*, was whether the particular licensing and generator fees at issue were unreasonably high. 973 F.2d at 1011-1012. The parties did not raise, nor did the court address, whether the contested fees were "service charges," but only whether they were "unreasonable." *Ibid.* The court of appeals did not definitively resolve the issue. It held that the record was insufficient to support a grant of summary judgment to the Navy on its assertion that the fees were unreasonably high. *Id.* at 1014.

Accordingly, *Jorling* and *Maine* present no conflict with the decision here, which addresses the different question of whether the dredging assessments at issue in this case are "service charges." Indeed, petitioner acknowledges that *Jorling* does "not address[] the precise issue" here because the United States "only challenged the reasonableness of those service charges." Pet. 25. Similarly, petitioner acknowledges that "the United States did not argue in *Maine* that the challenged fees were not 'service charges,' but instead challenged their reasonableness." Pet. 26. Thus, the court of appeals' summary affirmance of the district court's decision concededly gives rise to no conflict with those cases. And petitioner's fact-specific challenge to the district court's determination that petitioner's

dredging assessments reflect no meaningful services or benefits provided by petitioner to the United States (Pet. 26-28) plainly does not present a federal question of general importance that should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2001

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No. 01-38

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In The

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STATE OF CALIFORNIA, acting by and through the California State Water Resources Control Board,

Petitioner,

v.

UNITED STATES OF AMERICA, U.S. Department of Army, Corps of Engineers,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR PETITIONER

In its Brief in Opposition, the United States effectively concedes that this case presents important questions of federalism; the United States does not contradict California's argument that this dispute is but the latest chapter in the recurring controversy between the States and the United States regarding the compliance of federal polluters with state environmental requirements. *See* Petition for Writ of Certiorari, 6-8. Instead, the United States argues that this Court should not grant California's petition because the Ninth Circuit's particular determinations in the challenged decision are too narrowly "fact bound" to be worthy of this Court's review. Opposition at 8. But the United States proceeds from a fundamental misconception.

The Ninth Circuit's decision is not fact bound; it is devoid of facts. The courts below simply had no critical facts before them. The district court ruled on the United States' motion to dismiss and had no evidentiary record before it upon which it could make any factual determinations concerning the relationship of the fees to the volume of the United States' dredging[1] activities

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[1] The United States repeatedly has characterized California's fees for waste discharge requirements as "dredging fees." In fact, California law provides that such fees may be assessed for a wide variety of other activities resulting in discharges such as storm water runoff from an equipment yard or parking lot, the operation of treatment facilities, solid waste disposal, or the discharge of contaminated soil associated with a site cleanup. Cal. Water Code § 13260 reproduced at App. 33-37; *see also* Petition at 5-6. It is only because the work of the Corps frequently involves dredging that the Corps tends to associate waste discharge requirements fees with that activity.

and the water quality impacts resulting from those activities.[2]

The Ninth Circuit's approach conflicts with the cogent precedent of the Second and First Circuits construing the phrase "reasonable service charges" in sovereign immunity cases involving payments of fees, an important and recurring question of federal law. Petition at 19-28. Indeed, the Ninth Circuit's factually unsupported determination that the Corps received no services or benefits directly contradicts the cases of *Jorling v. United States Department of Energy*, 218 F.3d 96 (2d Cir. 2000), and *State of Maine v. Department of Navy*, 973 F.2d 1007 (1st Cir. 1992). These cases recognize that the cost of reviewing permit applications, conducting investigation and inspections, reviewing reports, taking enforcement actions, and other regulatory activities constitute legitimate regulatory

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[2] Thus, for example, the United States argues that California's fees are not "requirements" to control pollution, but instead are fees that are imposed in order to generate revenue for state programs. Opposition at 9. But the court had no evidence before it as to how much money California spends to regulate the Corps of Engineers' activities, and no basis whatever for any assumption that the fees assessed exceeded these regulatory costs. In addition, the United States argues that the propriety of the court's extra-record "finding" that California provides " . . . no services or benefits . . . whatsoever" to the Corps is a narrow question that this Court should not resolve. App. 25, Opposition at 8, 14-15. But this "finding" actually represents the Ninth Circuit's ruling that as a matter of law, California's fees are not "requirements" within the meaning of Clean Water Act sections 313(a) and 404(t), 33 U.S.C. § 1323(a) and 33 U.S.C. § 1344(t). Hence, the Ninth Circuit's rulings are sufficiently broad to present important questions of federal law that have not been, but should be, decided by this Court.

services for which reasonable fees may be charged. Petition at 28.

Moreover, the United States offers no real defense of the Ninth Circuit's misconstruction of this Court's decision in *Department of Energy v. Ohio*, 503 U.S. 607 (1992). In determining that California's waste discharge requirements fees are disguised punitive penalties, although they do not punish dischargers for past misconduct, the Ninth Circuit has decided an important federal question in a way that both misconstrues and conflicts with *Department of Energy v. Ohio*. Petition at 8-11. California has never sought civil penalties in this case. The State seeks to recover only reasonable service charges which all other dischargers must pay. Petition at 9, fn. 4. The amount of the fee is based on the volume of discharge and has nothing to do with punishment for past noncompliance. Petition at 5-6, 7.

Last, the United States defends the Ninth Circuit decision by erroneously applying the canon of interpretation that a specific statutory provision may control a more general provision, where the two provisions conflict. Opposition at 11-12. But here, the two provisions are not in conflict; they are complementary. Petition at 17-19. The plain language of the Clean Water Act reveals a coherent, unequivocal textual waiver of sovereign immunity for the fees at issue here, with section 313(a) emerging as the primary waiver, while section 404(t) is fundamentally a savings clause. The express intent of language employed in section 404(t) – "[n]othing in this section shall preclude or deny the right of any State . . . " is to prevent section 404 from being interpreted to override any rights saved to the States under any other provisions of law, including sections 303, 510 and 101(g) of the

Clean Water Act. Petition at 13-19. The Ninth Circuit's ruling would turn Congressional intent on its head, interpreting section 404 to prevent any State from asserting its authority under section 313 of the Clean Water Act. Moreover, Congress uses the term State "requirements" in the same context in both sections 404(t) and 313(a); there is no indication that Congress intended "requirements" to mean something different in section 404 than it does in section 313.[3]

In defending the Ninth Circuit's decision, the United States embraces a misconstruction of the applicable provisions of the Clean Water Act in a manner inconsistent with the terms of the statute itself. Indeed, the decision completely ignores two critical phrases in section 313(a): the phrase stating that "requirements" include "any requirement respecting permits and any other requirement, whatsoever . . . " and a later phrase which mandates the section's application "notwithstanding any immunity of [federal] agencies . . . under any law or rule of law." *See* Petition at 16. The decision misconstrues the Clean Water Act in holding that sections 313(a) and 404(t) do not waive federal sovereign immunity from the State's permit-related regulatory fees at issue here. The waiver contained in those sections is clear, unambiguous, and unequivocal. Federal dischargers, like other dischargers, are subject to California's "requirements," including "reasonable service charges." *See* Petition, 11-19.

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[3] It is a maxim of statutory interpretation that "when the same words are used in different sections of the law, they will be given the same meaning." *Barnson v. United States*, 816 F.2d 549, 554 (10th Cir. 1987), *cert. denied*, 484 U.S. 896 (1987); *see also, Firestone v. Howerton*, 671 F.2d 317, 320 n.6 (9th Cir. 1982).

Accordingly, California urges this Court's review of the substantial questions presented in this case. The decision below conflicts with a decision of this Court, conflicts with decisions of the Second and First Circuit on the same important matter, and presents important questions of federal law that have not been, but should be, decided by this Court.

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the Petition, certiorari should be granted.

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